

(25,435)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 605.

THE NORTHWESTERN MUTUAL LIFE INSURANCE
COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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In the Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff
in Error,

VS.

THE STATE OF WISCONSIN, Defendant in Error.

And now comes the above-named plaintiff in error and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings in the said action below, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of errors:

I. The Supreme Court of the State of Wisconsin erred in holding and deciding that section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes, was not invalid on the ground of its being repugnant to the constitution of the United States, and in contravention thereof.

II. The Supreme Court of the State of Wisconsin erred in holding and deciding that said section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes was not invalid because repugnant to section I of the 14th. Amendment to the constitution of the United States.

III. The Supreme Court of the State of Wisconsin erred in holding and deciding that said section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes, did not abridge the privileges and immunities of citizens or of this plaintiff in error as guaranteed by the provisions of section I of the 14th. Amendment to the constitution of the United States.

10 IV. The Supreme Court of the State of Wisconsin erred in holding and deciding that said section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes, did not deny to any person or to this plaintiff in error the equal protection of the laws as guaranteed by the provisions of section I of the 14th. Amendment to the constitution of the United States.

V. The Supreme Court of the State of Wisconsin erred in holding and deciding that said section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes, was not invalid because repugnant to that part of section 8 of Article I of the constitution of the United States known as the "Commerce clause" of said constitution.

VI. The Supreme Court of the State of Wisconsin erred in holding and deciding that said section 51.32 Wisconsin Statutes of 1913, formerly section 1220 Wisconsin Statutes, as applied to this plaintiff in error did not unduly obstruct or burden commerce among the several states in contravention of section 8 of Article I of the constitution of the United States.

For which errors, the plaintiff in error, the Northwestern Mutual

Life Insurance Company, prays that the said judgment of the Supreme Court of the State of Wisconsin, dated June 13, 1916, be reversed, and a judgment rendered in favor of the plaintiff in error, and for costs.

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11-110 [Endorsed:] Original. In the Supreme Court of the United States. The Northwestern Mutual Life Insurance Company, Plaintiff in Error, vs. The State of Wisconsin, Defendant in Error. Assignment and prayer. Filed Jul- 7, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis .

111 * * * * *

Thereupon the opinion of the Court by Chief Justice Winslow and the dissenting opinion of Justice Timlin were filed in words and figures following, that is to say:

112 In Supreme Court, State of Wisconsin.

August Term 1915, State No. 2.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
THE STATE OF WISCONSIN, Defendant.

WINSLOW, C. J.:

The plaintiff, a domestic mutual life insurance corporation, doing business on the level premium plan, brings action in this Court against the State to recover license taxes paid to the State under protest amounting to \$482,193.23 in 1912, and \$505,643.22 in 1913.

The license taxes were levied under section 1220 Statutes of Wisconsin 1911 (being sec. 51.32 Stats. Wis. 1913) and the plaintiff's claim is that the statute is void, (1) because it denies the equal protection of the laws guaranteed by the State Constitution and
113 by the Fourteenth Amendment to the Federal Constitution, and (2) because it unlawfully interferes with interstate commerce. The complaint shows that the claims were duly presented to the State Legislature and disallowed. The State demurs (1) because this Court has no jurisdiction of the defendant's person, (2) because it has no jurisdiction of the subject of the action and (3) because the complaint does not state a cause of action.

In support of the first two grounds of demurrer it is argued that section 3200 of the Statutes, under the terms of which this action

is brought by original action in this Court, is void because it attempts to confer original jurisdiction upon this Court in violation of section 3 of Article VII of the State Constitution the provisions of which, so far as material to this inquiry, are that "the Supreme Court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only."

It is sufficient to say in answer to this objection that section 27 of Article IV of the Constitution provides that "the legislature shall direct by law in what manner and in what courts suits may be brought against the State" and that it was decided by this Court in 1853 (*Dickson vs. State* 1 Wis. 110) that this section gave power to the legislature to designate the Supreme Court as the Court in which such suits might be brought, such designation being considered as one of the exceptions referred to in section 3 of Article VII.

This decision has never been overruled or questioned; it directly sustained the constitutionality of Chapter 249 of the laws of 1850 which has been upon our statute books ever since and with substantial changes now appears as sections 3200-3203 of the 114 Statutes. This decision has also been uniformly recognized in numerous instances by all departments of the state government, legislative, executive and judicial, as correctly construing the constitution from the time of its rendition up to the present time, a period of more than sixty years. To overrule it now would be hardly permissible even if we were convinced (which we are not) that it was incorrect as an original proposition.

The law in question provides in substance that every company transacting the business of life insurance in this state (except fraternal societies having lodge organizations and insuring only their own members) shall annually pay as license fees for transacting such business and in lieu of all other taxes, except taxes on real estate, the following amounts:

Domestic level premium or old line companies three per centum of the gross income for the year, excepting therefrom rentals of real estate on which the taxes have been paid, and premiums collected outside the state on policies held by nonresidents;

Foreign level premium or old line companies \$300, except that whenever the law of the foreign company's domicile requires a larger license fee or tax to be paid by an outside company as a condition for the issuance of a license, then such foreign company shall pay the same fee or tax for a license permitting it to do business in this state;

Stipulated premium companies, foreign or domestic, \$300;

Assessment companies, foreign or domestic, and fraternal associations having no lodge organizations, \$300;

115 Fraternal associations having lodge organizations and insuring only their own members, nothing.

The plaintiff's first claim is that this law denies to it the equal protection of the laws because it makes arbitrary discrimination, (1) as between it and foreign level premium companies, (2) as between level premium companies and fraternal insurance organizations, and

(3) as between domestic level premium companies and assessment and stipulated premium companies.

The plaintiff's second claim is that the law unlawfully hampers and interferes with interstate commerce.

These claims will be discussed in their order.

I. Under this head the most serious contention doubtless is the contention that there is arbitrary and illegal discrimination between the plaintiff and foreign companies of the same class, i. e. companies doing life insurance business in this state on the level premium plan. The plaintiff, a domestic corporation, is required to pay for the privilege of doing business in this state a license fee amounting to three per centum of its gross receipts, (certain classes of receipts being excepted) while foreign corporations doing business upon the same plan are required to pay only \$300 per year, (except in cases where the retaliatory clause is called into operation) for the same privilege.

It is clear that this so-called license fee is a privilege or occupation tax, and that, while it is not subject to that clause of the State Constitution which requires the taxation of property to be uniform (section 1 Article VIII) it is subject to the general equality clauses of the

State Constitution and to the clause guaranteeing the "equal
116 protection of the laws" contained in the Fourteenth Amendment to the Federal Constitution. It is clear also that this means that there can be no arbitrary or whimsical classification but that there may be classification founded upon real differences of situation and condition affording rational grounds for the difference in treatment. *Black vs. State* 113 Wis. 205, 219; *Nunnemacher vs. State*, 129 Wis. 190, 220; *Beal vs. State* 139 Wis. 544, 557; *Connolly vs. U. S. P. Co.*, 184 U. S. 540, 559, 560.

The disparity between the annual license fee required of domestic companies by the law in question, and the fee required of foreign companies is admittedly very great and the question arising is simply, whether there is any substantial difference, other than the difference between foreign and domestic corporations, which differentiates the two classes and which justifies such great difference in treatment.

The question is by no means an easy one. A corporation is a person within the meaning of the Fourteenth Amendment and a state cannot under that amendment discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse. *Yick Wo vs. Hopkins* 118 U. S. 356; *State vs. Hoyt* 71 Vt. 59, 42 Atl. 973. Every person, whatever his citizenship, is protected against unequal laws.

On the face of it this law seems to allow foreign life insurance companies to do business in this state upon payment of a mere nominal fee while exacting from domestic companies for the same privilege a very large fee; are there any real differences between the two classes

which bear a just and proper relation to the attempted classification and justify this difference of treatment? If there are
117 such differences the law may doubtless be justified so far as this objection is concerned for it is quite well established that the Fourteenth Amendment does not prevent a state from changing its system of taxation in all proper and reasonable ways, nor from allow-

ing exemptions, nor from imposing different specific taxes upon different trades or professions, nor from classifying property for taxation so long as the classification does not invade rights secured by the Federal Constitution. *Bell's Gap R. R. Co. vs. Penn.*, 134 U. S. 232; *Connolly vs. U. S. P. Co. supra*.

The question whether there are substantial differences of condition reasonably suggesting the propriety of difference of treatment is primarily a legislative question and the legislative judgment thereon is not to be disturbed by the courts unless legislative action has clearly passed the boundaries of reason. Given the differences of condition above referred to and the field of legislative action is very broad; the legislative judgment is not to be interfered with merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law nor unless the Court can confidently say that no reasonable ground can be discovered to support the classification.

In approaching this question it is important to note at the outset that the license tax in question is levied in lieu of all other state taxes except taxes on real estate owned by the company. It covers all the contributions which the state demands from the company or its business except real estate taxes which are relatively small in amount. It is common knowledge that all of the great level premium insurance companies of the present day have vast reserve funds, 118 to protect their liabilities on policies, running up into the hundreds of millions of dollars and that these reserves are invested in interest bearing securities of which real estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real estate mortgages amounting to \$153,562,654.39 of which only \$5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real estate mortgages for the year ending on said last named date amounted to \$7,446,393.10 and its income from bonds to \$3,172,489.58. These securities are all credits, i. e. personal property of an intangible character the situs of which for the purposes of taxation is in this state at the residence of the corporation.

The power of the state under the constitution to levy occupation taxes in the shape of license fees in lieu of other taxes can not now be questioned. *C. & N. W. R. Co. vs. State* 128 Wis. 589; *Nunne-
macher vs. State supra*. Having determined on the license system of taxation for all life insurance corporations the state faced this situation; on one hand were the domestic level premium companies (of which the plaintiff is by far the most conspicuous example) having their reserves invested in securities or credits, all of which were not only taxable in Wisconsin but should, in justice to other taxpayers, contribute to the expenses of the government which created and protects their owners; and on the other hand were the foreign level premium companies also having great reserves practically 119 none of which were taxable in Wisconsin and which were presumably subjected to just and adequate taxation in their respective domiciles. The essential difference was not the difference

in residence but the difference in the location for taxing purposes of the reserves. This difference is certainly a very real one, germane to the subject of license fee taxation, and it plainly suggests, if it does not indeed demand, some substantial difference of treatment in the matter of the amount of the fees exacted. It would be indefensible to subject both classes to the merely nominal fee of \$300, thus allowing the great reserves of the local companies to escape taxation entirely, and it would be equally indefensible to exact of both classes a fee large enough to accomplish just taxation of the domestic company. The first course would practically exempt from taxation a very large volume of the state's taxable property, thus increasing the burdens of all other taxpayers, and the second course would probably bar out every foreign life insurance company from the state, and either course would manifestly give to the domestic companies a very great advantage over foreign companies doing the same business.

Plainly, the only course which could be followed, if just taxation were to be approximated under the license system of taxation, was a course which should in some way compel the domestic company to make a fair contribution to the support of its home government, while recognizing and allowing for the fact that presumably every foreign company is compelled by its home state to do substantially the same thing.

Whether this be done by personal property taxation, by income taxation or by license fee taxation was, we think, a question for the state to decide. We are unable to say that the state has
120 not acted within the bounds of reason in fixing the license fees in the present case. It seems quite certain that a personal property tax would have exacted far larger contributions from the plaintiff to the public revenues than the license fee provided by this law.

It is not to be expected that any precedent exists exactly on all fours with the present case but we think it clear that the principle upon which the classification in question is based has been approved in a number of cases decided by the Federal Supreme Court in recent years. *Pacific Exp. Co. vs. Seibert* 142 U. S. 339; *Kidd vs. Alabama* 188 U. S. 730; *Brown-Forman Co. vs. Kentucky* 217 U. S. 563.

The conclusion reached on this branch of the argument renders it unnecessary to consider at length the question whether the law is in any respect aided by the retaliatory feature. Retaliatory laws have been held valid by the Federal Supreme Court (*Phila. F. A. vs. New York* 119 U. S. 110) and we find no necessity for considering the question as to the practical effect of that feature in the present law. Any effect which it may have must of course be in the direction of lessening the disparity in treatment of which the plaintiff complains in the present case.

This brings us to the contention that there is unlawful discrimination between level premium companies and fraternal benefit associations having lodge organizations which, under the terms of the law, are exempted from the payment of any license fees. We do not feel that we should be justified in consuming any considerable amount of time or space in meeting this contention.

121 That there is much difference of condition between the great level premium company with its great reserves and the ordinary fraternal benefit association can not be questioned. That the differences are such as to justify classification and difference of treatment so far as license taxation is concerned seems to us quite evident. The level premium company is purely a business concern; the true fraternal benefit association is a banding together of many groups of neighbors primarily for social purposes but with the further idea of rendering mutual help in misfortune, sickness or death and inculcating the principles of brotherhood among the members. Such associations have no great expense account, they conduct the insurance feature of their organization at comparatively small cost and they have no such immense volume of reserve funds. Probably the lodge organization is their most marked differentiating characteristic. It is this characteristic which the legislature has chosen as decisive of their character, and we do not feel that we can say that the choice was made without reason. It avails not to say that there may be some instances where the lodge organization is almost or quite a pretense and the supposed fraternal association really approaches very closely to an insurance company. Nearly all classification possesses this defect. Individual cases near the border line on either side often present no differences worthy of notice but this does not invalidate the classification. It is the class, considered broadly as a class which must possess the substantial differences suggesting the propriety of different legislative treatment, not every individual of the class. The principle is familiar.

122 This state has recognized the distinct and exceptional character of fraternal associations and treated them as forming a class which should be subject to its own legal code since 1889 and still continues to do so. Wis. Stats. 1913 sec. 1956 et seq. The brief of the state informs us that the laws of forty-two states recognize the same distinction and that twenty-nine of these states have specified the lodge system as one of the distinguishing features of such organizations. We have not verified all of the citations but have no doubt of their substantial accuracy. We see no reason to doubt that the differences between these organizations as a class and level premium insurance companies as a class are so real and substantial as amply to justify classification. This conclusion receives support in the case of *German Alliance Ins. Co. vs. Kansas* 233 U. S. 389.

We now reach the alleged illegal discrimination between domestic level premium companies on the one hand, and assessment and stipulated premium companies, whether foreign or domestic, on the other. The following statements from insurance writers are quoted with apparent approval in the plaintiff's brief: "The assessment system * * * is that one under which, theoretically, the cost of the insurance is annually collected from the members by assessing on them the costs; in practice there have been so many modifications of this theory that it is difficult to characterize the assessment plan, but the essential idea in this system is that no reserve is collected." (Gephart, *Principles of Insurance*, pp. 100 & 101.) "For a long time they (assessment companies) were all agreed

"that a reserve was not merely unnecessary but useless and dangerous. But after a time the simple science of the natural premium tables made it clear that, whether a society regarded it or not,

123 "there is a gradual and inevitable advance in the cost of insurance with the increase of hazard because of the advancing ages of the insured, and consequently several co-

"operative companies gave up the principle of 'pay as you go' and collected such amounts in excess of current expenses and losses as in the varying opinions of their managers would be likely to hold the premiums stable. The variety of views as to the cause of alterations in current cost and the mode of remedying them is indicated by various terms adopted to designate the reserve accumulations—emergency fund, guarantee fund, mortuary reserve fund, special reserve fund, and the like. This is a very great change from the original basis and utterly invalidates the narrow and specific definition of assessment insurance which has been given. The new definitions must cover practically all forms of insurance which do not make compliance with legal reserve laws fundamental; in fact such compliance or non-compliance may be made the shibboleth to distinguish the two forms of insurance." (Dawson on "Assessment Life Insurance" pp. 4, 5.)

"The assessment companies * * * are less scientific in their operations. No mortality tables are used, no interest rates are assumed and no technical reserves are maintained. The original plan of the purely assessment companies was to wait until one or more losses had occurred and then levy an assessment sufficient to cover such loss or losses. This, however, proved uncertain and so annoying to the members that they invariably withdrew, the young and healthy withdrawing first. This left the old and decrepit to pay the consequent increasing assessments and finally to meet with disaster. A variety of methods have been tried to obviate this difficulty. In late years most of these

124 "associations have collected advance assessments in the form of stipulated premiums and have accumulated so-called 'reserves.'" (Wisconsin Insurance Commissioners' Report on Life and Casualty Insurance of 1907, pp. 39, 40.)

"A term (stipulated premium) somewhat vaguely applied to the premium charge of sundry assessment associations. Instead of irregular assessments, a stipulated amount yearly is charged, the same to remain level until found inadequate for the payment of increasing death losses when an additional charge may be made. The original charge, the so-called stipulated premium, varies in different associations according to the guess of the management. It serves the purpose for a few years, but sooner or later proves inadequate, and must be increased in amount, or an additional assessment must be made." (Jackson's Definitions in Life Insurance, p. 24, no. 51.)

It is quite apparent from these three excerpts that assessment insurance pure and simple, except so far as the fraternal orders are concerned, has broken down and that experience has demonstrated that a premium plan having some resemblance at least to the level

premium plan must be adopted if assessment companies are to live. The legislature of Wisconsin recognized the inherent weaknesses of assessment insurance as early as 1899, and by chapter 270 of the laws of that year authorized the formation of companies on the stipulated premium plan and provided for the reincorporation of assessment associations or societies under the act. This act required the charge by such companies of net premiums calculated on mortality tables equal to that of yearly term insurance at the age of entry and increased at least twenty-five per cent; it also provided for the accumulation of certain reserves. This act was evidently not satisfactory and was repealed by Chapter 447 of the 125 laws of the same year two sections were added to the statute which are now numbered Sections 1955y-1 and 1955y-2.

The first of these sections provides that no life insurance company (other than fraternal associations) "which issues contracts the performance of which is contingent upon the payment of assessments or calls made upon its members, shall do business in this state except such companies as are now authorized to do business within this state, and which shall value their assessment policies or certificates of membership as yearly renewal term policies according to the standard valuation of life insurance policies presented by the laws of this state." The section further provides for the details of the required valuation and also compels the company to keep a certain reserve.

By this section all assessment companies were forbidden to do business in the state in the future except those which were lawfully doing business here at the time of the passage of the law and they were required to adopt the stipulated premium plan. It appears by the published reports of the Insurance Commissioner that at the time of the passage of this law (Chapter 447, Laws of 1907) and for some time prior thereto there were no domestic assessment companies doing business or licensed to do business in the state. The law inhibits them in the future hence there is no such class as domestic assessment or stipulated premium companies and can be none.

There were but three foreign assessment companies doing business in the state in 1907 and there is said to be but one now. This company must, of course, be doing business on the stipulated premium plan and must constitute the entire class. The 126 reasons already given for upholding classification as between domestic and foreign level premium companies apply with greater force to the classification as between domestic level premium and foreign assessment or stipulated premium companies.

II. Passing to the consideration of the question whether the statute imposes an unlawful burden on interstate commerce the argument is that, while the business of insurance, i. e. issuing policies, collecting premiums and paying losses, is not interstate commerce, (N. Y. Life Ins. Co. vs. Deer Lodge Co., 231 U. S. 495) the business of loaning money on real estate or other security to the citizens of other states is undoubtedly interstate commerce which

is necessarily burdened by the tax in question. The investment business of the plaintiff is indeed a vast one considered by itself alone. It appears that the plaintiff in December 1911 possessed nearly \$150,000,000 worth of foreign mortgage loans, and between \$70,000,000 and \$80,000,000 worth of foreign bonds. The carrying on of such a business necessarily requires constant transmission from state to state of applications for loans, abstracts, notes, bonds, mortgages, policies, drafts and other papers to say nothing of the employment of agents in the various states where the loans are made.

It is said that the foreign investment branch of the business is not interstate commerce because it is a mere necessary incident of, and cannot be considered apart from, the insurance business which, as we have seen, is held by the Federal Supreme Court not to be interstate commerce. The argument may be sound, but we do not pass upon it. We shall undertake no voyage of discovery on the sea of interstate commerce unless we are compelled to do so.

127 That sea is a troubled one, full of rocks and shoals, as yet imperfectly charted. We do not find ourselves compelled to embark upon it in this case.

If, as argued by the plaintiff, the investment business be a separate business and a form of interstate commerce, the answer is that the law places no burden upon that business. It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. If it does not do so, it may transact all the investment business which it desires to transact without paying any license fee under this law.

It is very well established by federal decisions that when the state exercises its legitimate and rightful power of taxation of an occupation or privilege it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable. *Maine vs. G. T. Ry. Co.* 142 U. S. 217; *Flint vs. Stone-Tracy Co.* 220 U. S. 107; *Baltic M. Co. vs. Massachusetts* 231 U. S. 68.

In the last cited case it is said in the opinion:

"It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state has been sustained (citing cases)."

These cases seem to us decisive of the question here. The receipts from the foreign investment business are simply used as measuring in part the amount of the tax to be levied not on that business nor on the receipts themselves, but on the business of life insurance conducted by the plaintiff, a subject of taxation which is unquestionably within the legitimate taxing power of the state.

128 III. A separate contention, affecting a part only of the tax collected, is yet to be considered.

It appears by the complaint that the total income of the company

by which the license fee for the year ending December 31, 1911, was measured was \$16,073,107.76 of which sum \$2,163,808.84 consisted of interest on premium notes and policy loans or liens. Receipts of the same character, though differing somewhat in amount, were included in the income of the following year. The plaintiff's claim is that these receipts are not "income within the meaning of the law" and hence that a ratable proportion of the license fee paid should be recovered, irrespective of the result on the general question of the constitutionality of the law.

It appears that the so-called policy loans are made to policy holders by virtue of a clause in the policies which declares that on request of the assured and upon sole security of the policy properly assigned, the company will advance, at a rate of interest not exceeding six per cent per annum, an amount which, with interest, shall equal the cash surrender value of the policy. The argument is that while these arrangements are called "loans" they are in fact but advance payments of amounts already owing to the policy holder and the so-called interest is simply an additional premium for continued insurance, and reliance is placed on the case of *N. Y. Life Ins. Co. vs. Assessors* 158 Fed. 462 affirmed in *Orleans Parish vs. N. Y. Life Ins. Co.* 216 U. S. 517.

The state makes a preliminary objection to the consideration of this claim to the effect that it has never been presented to the legislature and hence that the Court under Sec. 3200 Statutes Wis. has no jurisdiction to consider it. Examination of the claims presented to the legislature by the plaintiff, copies of which are attached to the complaint, certainly show that the invalidity of the whole tax by reason of the unconstitutionality of the law was the contention chiefly relied upon. The claims, however, both contained the distinct statement that the tax complained of was "in excess of the amount legally required" under the law in question "portions of said amount being derived from a percentage of amounts not constituting taxable incomes of said company," and the claims also prayed for refund of the amounts paid, "or such portions thereof as may be ascertained the state was not entitled to receive."

We are not disposed to draw fine lines on this question. While the plaintiff's claim did not go into details, it did certainly make the distinct assertion that there were portions of the fee which were illegal and which it sought to recover even if the law itself were to be held constitutional.

The plaintiff argues that if these so-called interest payments be in fact premiums, they are premiums collected outside of the state on policies held by non-residents and hence are not part of the income made by the law the measure of the taxation.

The complaint charges that "the proportionate part of the business transacted by it through commercial intercourse with residents of state other than Wisconsin was on December 1st, 1911, approximately as follows:

"1. * * *

"2. * * *

"3. * * *

"4. Of the total amount of outstanding policy loans or "advances more than 93 per cent."

For the purposes of the case we assume that this should be construed as meaning that more than 93 per cent of the policy loans are made to non-residents of Wisconsin and hence that the payments of interest thereon are payments made outside of the state by non-residents thereof. Even with this assumption we do not think the plaintiff's contention can be sustained.

In the case cited (*Orleans Parish vs. N. Y. Life Ins. Co. supra*) the state legislature of Louisiana had passed a law attempting to tax a foreign insurance company on such policy loans as "credits" within the state. The trial Court and the U. S. Supreme Court held that they were in fact but advance payments made by the insurance company, and that the so-called note given as evidence of the advance did not represent a debt because there was no debt created, and if no debt no credit.

Accenting this doctrine fully it nevertheless does not control this case. The question here is simply, what did the legislature mean by the words "gross income" and "premiums collected."

If they used these words in their ordinary every day sense (and there is nothing to show to the contrary) then the case cited has no appreciable bearing on the present controversy, because it must

131 be admitted at once that the interest payments on policy loans have never been called premiums either by the plaintiff or by the public generally. If they are not "premiums" within the meaning of that word as used in the act they are necessarily a part of the "gross income" upon which the three per centum must be calculated.

The fact that in a logical sense they may possess more of the characteristics of premiums than of credits cuts no figure. The controlling question is whether the legislature intended to include them when it used the word "premiums." We are clearly of opinion that there was no such legislative thought.

Our conclusion is that the complaint states no cause of action.

BY THE COURT:

Demurrer overruled as to the first and second grounds and sustained as to the third ground and judgment ordered that complaint be dismissed on the merits with costs.

132 STATE OF WISCONSIN:

In Supreme Court.

State No. 2.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
v.
STATE OF WISCONSIN, Defendant.

TIMLIN, J., dissenting:

I am unable to agree with the disposition of this case made by the majority of the court and shall state as briefly as possible the grounds of my dissent.

1. The case of International Text Book Co. v. Peterson 133 Wis. 302, was decided (not without misgiving) before the decision in International Text Book Co. v. Pigg 217 U. S. 91. The latter was a default case and the Peterson case also went by default in that high court. But both cases were after full argument reviewed and confirmed in N. Y. etc. Ins. Co. v. Deer Lodge Co. 231 U. S. 495, 510, and it was there affirmed contrary to the decision of this court in the Peterson case that the transmission for a cash consideration paid or promised, of didactic written or printed discourse with explanatory diagrams and charts and with text books, not for resale, from a person in one state to a person in another state constituted inter-state commerce. These decisions were not alone precedents, they were also events in the development of federal and state relations under the federal constitution. Another event which has since

133 occurred is the enactment of the currency bill with its chain of banks and the necessity of a continual transmission of money, notes, bonds and securities from one state to another so that without going into any further specification or analysis of federal decisions I think there can no longer be any doubt that carrying on a loan business involving the transmission of money and securities with the necessary correspondence, instructions, vouchers and other writings, constitutes interstate commerce. I do not know of any principle or precedent that would warrant us in saying that because the plaintiff is an insurance company whose business of delivering policies and collecting premiums is not commerce, no act done by it can be called commerce which would have been commerce if done by another. It seems to me that this would be a far reaching restriction upon commerce and would introduce into a subject already too complicated a multitude of new and puzzling questions. Neither can I bring myself to believe that all transactions relating nearly or remotely to or even necessary to a business that is not commerce can be excluded from the meaning of the word "commerce". On the other hand when I examine the question whether that part of plaintiff's business which consists of policy loans to non-residents is the equivalent of collecting premiums I am brought up against the difficulty that if it is it should have been

excluded from the base of computation by the terms of the statute, and if it is not it is interstate commerce and should have been excluded. With reference to the other loans to non-resident persons, natural or corporate, I consider this business clearly interstate commerce. Therefore the income from the loan business carried on by the plaintiff with persons in other states which forms the principal part of the base of computation upon which the amount of
134 plaintiff's tax is computed is the income of inter-state commerce notwithstanding that plaintiffs' business of delivering insurance policies and collecting premiums is not such commerce. *N. Y. Life Ins. Co. v. Deer Lodge Co.* supra. "Gross income" is the practical equivalent of gross receipts in such business.

2. I think the statute in question, sec. 1220 Stats. 1911, could and should have been so construed as to save it from all taint of unconstitutionality. This would, of course, permit some recovery by the plaintiff. Why does the statute exempt from the base upon which the amount of license fee is computed "premiums collected outside of the state of Wisconsin on policies held by non-residents of the state of Wisconsin"? I do not think we can say with any confidence that it was because the state in which non-residents of Wisconsin lived might by excise or other form of taxation reach such premiums and so cause double taxation because in the parallel case of real estate situated outside of this state and referred to in the same section the income is exempted only in these cases where the corporation has paid the taxes assessed on the land, and further because the other state might as easily collect taxes on income from loans made and collected in that state as upon premiums so collected. If the premiums mentioned were thought by the legislature to be income derived from interstate commerce that would be an argument in favor of the additional exemption of interest on loans collected in like manner which is more surely interstate commerce. If it was considered that such premiums did not constitute an income from interstate commerce why should the legislature relieve that which it believed was not interstate commerce and thus increase the burden upon the latter commerce by making the income from

135 such interstate commerce a larger part of the base of computation? We are not to interpret the statute upon any theory that the words have no significance beyond the mere exemption of the specified premiums. But even if we so limit these words we would be called upon to include in the word "premiums" all collections outside of the state which by fair interpretation could be covered by the word "premiums" and if necessary to uphold the statute the comprehensive words "from all sources" should, upon approved rules of interpretation, be restrained so as to include only such sources as the state legislature had jurisdiction to include in the base of computation and so as to exclude income derived from interstate commerce. *Waters, Pierce Oil Co. v. Texas* 177 U. S. 28; *Elwell v. Adder-Machine Co.* 136 Wis. 82.

3. With the interpretation given to this statute by the taxing officers of the state and approved by the majority opinion I think, with all deference to that opinion, the statute is unconstitutional as not

only a burden upon, but a very plain attempt at, a kind of regulation of interstate commerce. The requirement of a license as a prerequisite to carrying on any business has always, I think, been considered one of the most effective and drastic modes of regulation. Failure to obtain the license where one is lawfully required outlaws the business and avoids the contracts made by him who fails to obtain the license and yet carries on business. When an excise tax is laid upon any business or occupation enforced by the requirement of a license and the license fee fixed by a percentage on the gross income if that income is derived in whole or in great part from interstate commercial transactions then the license fee necessarily

136 increases with the increase of interstate commerce and diminishes with its diminution. It makes no difference in this result if the total gross income is derived from interstate commerce or only a substantial part of it. If it were conceded that the license fee in the case last stated was a prerequisite to engaging in interstate commerce there could be no question I think but that such mode of measuring the amount and enforcing the payment of the excise tax would be a direct regulation of or an unquestioned burden upon inter-state commerce. I think the majority opinion misapprehends the nature and effect of statutes requiring a license. Such statutes provide an effective mode of compelling the observance of regulations or the payment of a tax. They go to the remedy. The objectionable part of this statute is that which requires the plaintiff to pay three per cent. on its gross income. (Cases cited like *Maine v. Ry. Co.* 142 U. S. 217 are obviously not in point here.) The legal effect of all such statutes is to say: "You are prohibited from carrying on the designated business or making the included contracts unless you pay a sum of money or submit to the specified regulations." The license is only the voucher which proves that the licensee has complied with the law. In the history of taxation in England there is the story of old Isaac of York who was induced to pay his taxes by pulling out one of his teeth every day until he paid. The law might have said to him with the same effect: "By the payment of a sum equal to the tax demanded you can obtain a license which will authorize you to keep all your teeth." If this law seeks to coerce the payment of a tax based upon gross income from interstate commerce by depriving the plaintiff of some other right, property

137-147 or privilege not connected with or a part of interstate commerce, then if this latter right, property or privilege is valuable enough, the withholding of license and the consequent outlawry of plaintiff's domestic insurance business is as effective an interference with interstate commerce as if the statute expressly made the obtaining of license a condition precedent to carrying on the business of inter-state commerce. We are all familiar with the instances where the obligation to obtain a license before embarking in a specified business or calling is enforced by penalties or forfeitures from which the proposed licensee enjoys immunity if he pays the sum required for the license. So here if plaintiff pays a percentage of its gross income from inter-state commerce it may have a

license to carry on its intrastate business, otherwise not and so otherwise subject to penalties.

4. I think the classification made by the act in question could be upheld if there were no questions of interstate commerce involved.

148 STATE OF WISCONSIN:

In Supreme Court.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
THE STATE OF WISCONSIN, Defendant.

Amended Complaint.

(Additions to original complaint are indicated by brackets.)

First. The above named plaintiff for a first cause of action herein alleges that The Northwestern Mutual Life Insurance Com-
149 pany is and ever since the year 1857 has been a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and duly authorized to transact the business of insurance on lives and to make all and every insurance pertaining to or connected with life risks and to grant and purchase annuities, to make reinsurance of any risks which it may have taken, and to make all such by-laws not inconsistent with the constitution and laws of the State as may be deemed necessary or for its interest in the appointment of its officers and agents and the conduct of its affairs in the various cities and towns of this State and of sister States and foreign governments; to take and hold property both real and personal to an amount authorized by law and to sell, convey or otherwise dispose of the same; to hold such real estate as shall be requisite for its accommodation in the convenient transaction of its business and such as shall have been mortgaged to it by way of security for loans previously contracted, or for moneys due, and such as shall have been purchased at sales upon decrees or mortgages obtained or made to secure indebtedness; to carry on its operations and business at such places as its Board of Trustees shall direct so far as the same may be done at its principal office in the City of Milwaukee, State of Wisconsin; to purchase for its benefit all policies of insurance and other obligations issued by it; to invest and reinvest premiums, income, reserves and other funds belonging to
150 it in, among other things, mortgages on real estate, in bonds of any county, city, town, or village or school district; in the mortgage bonds of any railroad company; in loans or advances secured by pledge of any railroad company; in loans or advances secured by pledge of any such bonds, or upon the security of its own policies; such investments to be made of its funds not only in the State of Wisconsin but in all other states and territories of the United States and the District of Columbia, and [also] to do and perform all the acts and things hereinafter stated.

That said plaintiff calls its said principal office, which is located in the City of Milwaukee, State of Wisconsin, its "Home Office," and in this complaint "Home Office" means said principal office in said City of Milwaukee. [That said plaintiff was not organized as, and has never been a stock company, but was organized and has always transacted business as a mutual company, its membership being confined to its policyholders.]

That said plaintiff for many years last past has been and is engaged in transacting the business of life insurance, as duly authorized by law, [(including the investment of its assets and funds,)] on a large scale with persons residing in all the states and territories of the United States excepting the states of Louisiana, Mississippi, Alabama, South Carolina, Florida and Alaska.

Second. That the defendant is and ever since the year 1848 has been one of the states of the Union.

151 Third. That in the year 1911 there existed contracts of life insurance made and entered into between said plaintiff of the one part and residents and citizens of the several states wherein said company transacted its business of the other part, aggregating on the 31st day of December, A. D. 1911, the sum of \$1,147,273,523.00 covered by 447,507 policies, and requiring premium payments amounting to the sum of \$40,421,263.23, [of which 37,275 policies, aggregating \$85,149,148, and requiring premium payments amounting to \$2,836,488.04 were outstanding in favor of residents of the State of Wisconsin;] that the amount of outstanding insurance contracts between said plaintiff and the several residents and citizens of said states and territories has continuously increased and amounted to the respective sums, and required for premium payments annually in the several years below named, as follow, to-wit:

Year.	Total Ins. in Force.	Annual Prem.
1900.....	\$529,647,290.00	\$20,885,265.96
1909.....	1,012,899,095.00	37,089,997.53
1910.....	1,080,139,708.00	38,877,078.53
1911.....	1,147,273,523.00	40,421,263.23
1912.....	1,229,377,814.00	43,599,141.74
[1913.....	1,304,385,035.00	45,583,283.58]
[1914.....	1,365,299,749.00	47,572,768.42]
[1915.....	1,420,012,571.00	49,461,752.31]

That said several policy contracts between said plaintiff and the residents of said states have been and are subject to sale, assignment and transfer, and to use as collateral security and other
 152 commercial purposes, and that the same have been and are a common subject of sale, pledge, assignment and transfer as articles of commerce, and have been and are used [extensively] as collateral security and for other financial and commercial uses, and are valuable for each and all of said purposes and for other general purposes of trade and commerce, and many of them are applied for and issued for the sole purpose of protecting and increasing the

value of the rights and property of individuals and corporations engaged in financial and commercial transactions.

Fourth. That the business of said plaintiff [as related to the] issuing of policies of insurance is now being [done] and heretofore has been done and carried on through the agencies and in the manner following, to-wit:

(1) Said plaintiff has employed and now employs, in the states and territories of the United States in which it carries on [such] business, agents authorized to solicit applications for insurance, to collect the first premium and to deliver policies on applications taken by them or their sub-agents in their respective states, provided said plaintiff upon consideration of such applications at its said home office had prepared and transmitted such policies to them for said purpose; said agents are employed under contracts in writing made directly with the officers of the plaintiff company at its home office and are residents of and maintain their offices in the respective states and territories in which they are authorized to do business under their contracts.

153 Said agents are also authorized by their said contracts to appoint, subject to the approval of the said plaintiff, sub-agents residing within the territory of said agents to solicit life insurance applications on behalf of said plaintiff, and said sub-agents maintain places, and carry on business, in said localities, under written contracts entered into with said agents when filed with and approved at the home office of the plaintiff. The number of agents representing said plaintiff in all the states and territories [on December 31, 1911, was 5,014, of which number 480 were transacting business for the plaintiff in Wisconsin and the remainder in other States and Territories of the Union.]

(2) Said plaintiff has for many years last past and still has in its employ in the various states and territories in which it carries on a life insurance business a number of physicians and surgeons called "medical examiners" and "alternate medical examiners" appointed by the proper officers of said plaintiff at its home office, after investigation, chiefly through the mails, of their fitness, such examiners being required to make physical examinations of applicants for insurance and additional insurance under prescribed forms furnished and required by and sent to them through the mails by said company, the alternate examiners being employed chiefly in the absence of the chief examiners. All such medical examiners are required to procure

154 full answers to questions prepared by said plaintiff respecting the health and physical condition of applicants for insurance and to furnish such other and further information as the home office may require. Reports on such medical examinations are made to said company by mail, or telegraph or express. Such medical examiners are residents of, and maintain places of business in, the several localities covered by their contracts with said company and are paid for their services directly from the home office of said plaintiff by means of a check or draft sent through the mails; such medical examiners are not authorized to accept or decline risks, but simply to report the results of their examinations and re-examine-

tions and such further information through correspondence as may be required by the home office, the home office alone determining the applicant's insurability and whether or not a policy of insurance shall be issued.

Said plaintiff has in its employ about 12,000 of such medical examiners located [and resident] in various portions of the states in which it carries on its operations, all under direct contract with and employed by the said plaintiff at its home office.

(3) Said plaintiff for many years last past has maintained and now maintains at its home office a division known as the Inquiry Division, chiefly maintained for procuring informaton with respect to applicants for insurance or with respect to those already insured in the company, and in carrying on the work of such inquiry
155 division employs inspection agencies in the several states in which it does business. Inquiries are made from the home office and reports from the various parties employed in the several states are furnished thereto by mail, telegraph and telephone, such reports received at the home office during the year 1911 from various parts of the United States amounting to upwards of 56,000.

(4) Said plaintiff for many years last past has prepared and transmitted by mail, express and freight to the persons employed by it in various states, forms for use in the various transactions in which they are engaged, also stationery and other supplies, soliciting material, instructions, educational and canvassing documents, all of which are prepared and sent out to them through the supply department of the home office, the number of such packages shipped by mail, express and freight during the year of 1911 amounting to upwards of 17,000. About 2500 separate pieces of mail relating to the business of the company are posted each working day of the year, the greater part of which are sent from the home office to residents of states other than Wisconsin, and not less than 1800 separate pieces of mail matter relating to the company's business are daily received from the residents of such states. A large number of telegraphic and telephonic messages are daily sent out by it to and received by it from residents of states other than the State of Wisconsin.

(5) None of its agents or representatives has ever been authorized to accept risks of any kind or to make, modify or discharge
156 contracts, but all such contracts are authorized or approved at the home office.

All officers of the plaintiff reside in the City of Milwaukee, Wisconsin, having their several offices and places of business at the home office building in said city.

(6) All risks and contracts with applicants for insurance have been negotiated and the several contracts made, modified, continued and performed substantially in the manner following, to-wit:

When one of its soliciting agents takes an application for insurance, the applicant signs a form prepared at the home office of the company and transmitted by mail or express to its agents for said purpose; the applicant is then examined as to his physical condition by one of the plaintiff's said local medical examiners who reduces

such medical examination to writing on a form prepared by said plaintiff at its home office and transmitted to said examiner for said purpose; after such medical examination is made and reduced to writing and signed both by the applicant and examiner, the same together with the medical examiner's report are transmitted from the place of residence of the applicant or of the soliciting agent to the home office of the plaintiff for consideration. Upon receipt of said application and report, an examination is made thereof by the medical department which either rejects or approves the application or writes for additional information. If such application be
157 approved, a policy contract upon a form prepared and approved by the company is written and signed by the officers of the company and then transmitted by mail to the plaintiff's agent at his residence for delivery and collection of the first premium thereon.

Statements upon blanks prepared at the home office and furnished by mail or express to its said agents at their places of residence are required to be, and are, made monthly by all agents of said company at its home office, and remittances made by them to cover the amounts of premium payments shown on such statements. The statements when received are duly checked, the remittances deposited in banks at the home office, all correspondence and intercourse in reference thereto being by telegraph, mail or express.

All policy contracts require said plaintiff to pay at their maturity the amount of insurance named therein at the home office of the company upon receipt and approval of proofs of death of the persons whose lives are insured. Blanks prepared by said plaintiff at the home office for making such proofs are furnished to applicants therefor and transmitted by mail, and when received back duly executed are examined and if found satisfactory checks or drafts or other forms of remittances in payment of the amount due under the policies are sent by mail or express or by other means of conveyance from the home office either direct to the parties entitled to
158 receive the same or to the agents residing in their locality for delivery to such parties.

Said policy contracts each and all provide that all premiums thereon are payable in advance at the home office of the company or to the agents of the company upon delivery of proper receipt signed by its proper officers.

Said policy contracts also provide that no agent has authority to waive forfeitures, or to make, modify or discharge contracts, or extend the time for paying premiums, and that none of these things can be done except by officers of said plaintiff at its home office.

Prior to the date of maturing of each premium on every policy contract issued, said plaintiff prepares a notice to the policyholder advising him of the date of the payment of his said premium, the amount to be paid, whether at the home office or to a duly authorized agent of the company, which said notice is transmitted by mail or other means direct to said policyholder or the proper agent of the company and by him transmitted to the policyholder. Upon receipt of premiums at the home office the same are there deposited in bank.

In case said remittances of premiums are not promptly made, a second notice to the delinquents is mailed from the home office, and if payment is not then made within the period allowed by the policy contracts, a third notice is transmitted by mail urging a restoration of the policy contract in accordance with its provisions and transmitting therewith the necessary blanks for that purpose.

159 The plaintiff prepares notices of dividends and annually transmits them by mail to all policyholders of the company.

Where premiums are charged under the automatic or premium loan provisions of the policies, a notice is transmitted by mail to the insured that the amount of such premium has been so charged and whenever repayment of the same, either in whole or in part, has been made by the policyholder, due receipt therefor is sent to him through the mails.

The policies issued by the plaintiff provide for advances to the policyholder on pledge of the policy as sole security therefor of an amount equal to or at the option of the insured less than the cash surrender value of the policy and of any existing dividend additions thereto at the end of the then current policy year. A large amount of such advances have been annually made to said policyholders, the amount thereof on the 31st day of December, 1911, being the sum of \$41,988,863.02. Said advances have each and all been made in substantially the following manner:

The policyholder transmits to the home office of the plaintiff an application for an advance to him out of the reserve on his policy, which application the plaintiff considers and acts upon at its home office, and if accepted, said plaintiff makes out a proper form of assignment of the policy which it forwards by mail for execution by the party applying for such advance, and after execution the same is forwarded with the policy to the home office and upon receipt thereof the plaintiff transmits by check or draft the amount so requested by mail to the applicant at his residence.

160 In this manner said plaintiff has continuously in the past made and is making advances to its policyholders in the various states where the company is doing business.

When annual premiums stipulated in its policy contracts have been paid for a certain number of years, the said policy acquires or earns what is known as a "reserve value," so that even though the insured should cease to pay his premiums or should surrender his policy, he is entitled to demand that said plaintiff pay him a sum representing such reserve value of his policy. Such reserve is a fixed and certain sum which said plaintiff is bound to pay the insured at the maturity of said policy but which said sum the plaintiff cannot ordinarily be compelled to pay before said policy matures. The amount of said reserve at any given date can be accurately computed and such reserve increases from year to year so long as the policy remains in force.

After such policy has acquired a reserve value, the policyholder may obtain the use thereof in two ways:

1st. By terminating the relations between himself and the Company and taking down the said reserve value; and

2nd. If the insured desires to continue further payments of the annual premium on the policy and so keep it in force until
161 it regularly matures, he may with the consent of the plaintiff, as provided in the policy contract, upon request and the sole security of the policy properly assigned, receive in advance the cash surrender value of the policy.

In the operation of the plaintiff's business the amount of the annual premium charged, the results promised to policyholders, and the provisions of a fund out of which its said policies are eventually to be paid at maturity, are based upon calculations showing the total fund which will be accumulated from payments of annual premiums and from interest derived from their investment and the reinvestment of such interest when earned. These calculations assume that all premiums paid will constitute an interest earning fund. Such calculations would be vitiated and the results would be less than computed if parts of the premium fund were used to pay reserve values in advance and thus be withdrawn from the interest earning fund. Such results are avoided by requiring that all policyholders withdrawing earned reserve values but continuing their policies in force shall pay annually to the company a sum which the amount withdrawn by them would have earned in interest if it had not been advanced to them at their request. This additional payment is referred to for convenience as "interest" but in reality is an additional premium. Such arrangement so made by means of which the plaintiff advances so much of the reserve of its policies as is represented

162 by the surrender value is designated for convenience a "policy loan," but such policyholder gets immediate use and control of such part of the surrender value of said policy as he may request.

For many years last past the plaintiff has had outstanding advances to policyholders in the various states aggregating a very large sum, amounting on the 31st day of December, 1911, to the sum of \$41,988,863.02, as hereinbefore stated, [of which the sum of \$39,300,995.11 was advanced to policyholders outside of the State of Wisconsin;] and the extra premiums paid on account of such advances during the year 1911 amounted to \$2,133,151.99, [of which amount the sum of \$1,983,556.96 was collected by said plaintiff outside of the State of Wisconsin upon policies held by non-residents of said State.]

The plaintiff has for many years last past permitted the policyholders under certain conditions and limitations to defer payment of portions of their premiums when due, the amount so deferred together with an additional amount commonly referred to as "interest" to be deducted from the proceeds of their policies in case of death unless sooner paid or cancelled by dividends apportioned by them upon their policies. Such deferred payments represented by and commonly referred to as "premium loan notes" amounted on the 31st day of December, 1911, to \$549,740.99: the amount of so-called "interest" thereon either in cash or by deductions approximating the sum of \$28,000, [of which amount approximately

163 \$25,000 was collected by said plaintiff outside of the State of Wisconsin upon policies held by non-residents of said State.]

The plaintiff has heretofore issued and now issues policy contracts which mature at designated times as endowments, and when such policies so mature the sums to be paid thereunder are calculated at its home office and a check or draft therefor is drawn to the order of the policyholder entitled to the amount due and transmitted to him at his proper postoffice address through the mails, with due receipt therefor to be signed and with the policy returned to the home office of the company. [That the amount of such endowments paid during the year 1911 was the sum of \$2,838,559.37, of which \$2,606,128.93 was paid to policyholders outside of Wisconsin.]

Fifth. Said plaintiff further alleges that as required or authorized by its charter and the laws of the State of Wisconsin, it has for many years last past conducted and at the present time is conducting that part of its business relating to the investment of its funds substantially as follows:

(1) In the investment of its funds in notes secured by real estate mortgages the Company employs at its home office a superintendent of special loan agencies who has general supervision of the employment and work of special loan agents residing and maintaining places of business in nineteen or more states of the Union.

164 Said special loan agents have offices in the states in which they reside, and their duties require them to solicit real estate loans to be made by said company; furnish forms of applications for loans on security of real estate, which forms of application are prepared and sent to them from the home office; examine the value and character of the real estate offered as security for the loan; prepare and transmit with the applications when signed a report or reports with reference to the property and to such other matters as are required by the Company; see that the abstract of title to the premises proposed to be mortgaged is procured and sent to the company either by mail or express to be examined at the home office; receive the report of such examination and such instructions as may be sent relative to the title or as to the perfecting of the same; see that the note and mortgage which are prepared at the home office and sent by mail or express are properly executed and returned to the company; obtain on examination of the papers when executed any additional evidences of title; examine the public records as to any additional incumbrances or conveyances; receive the check or draft sent by the company to cover the amount of the loan and deliver the same to the borrower, and after the recording of the mortgage return the same together with the note, abstract and all other necessary papers by mail or express to the home office of the company.

165 The said loan agents receive a stated salary for doing the local business required of them as such agents, such compensation being transmitted to them direct through the mails from the home office by check or draft on, or procured from, its bank in Milwaukee.

(2) On the receipt at the home office of an application for a loan secured by real estate mortgage, the same together with the report of the special loan agent and other correspondence upon the subject are examined and the amount, terms and conditions of the loan are determined and information with respect to the action of the company is transmitted by mail or otherwise together with written instructions to the applicant.

(3) Applicants for such loans are required to procure at their own expense an abstract of title to the property proposed to be mortgaged, which abstract and any extension thereof are transmitted by mail or express to the home office to be examined for the purpose of ascertaining the condition of the title to the proposed mortgaged premises, and if on examination the title is found satisfactory, a note and mortgage are prepared at the home office and sent by mail or express to the applicant for execution after which they are returned to the home office for approval. Before the check or draft is delivered to consummate the loan the mortgage is required to be filed for record at the proper recording office of the county where the premises are located and the abstract continued so as to show that the said
166 mortgage is a first lien or incumbrance on the property. The abstract and all evidences of title together with the note and mortgage are returned by mail or express to and retained by said company at its home office until the loan is fully paid and released.

The money or draft in payment of the mortgage is sent [by the mortgagor or his representative] by mail or express to the home office of the company and upon its receipt a due release or satisfaction of the mortgage is prepared and with the note, mortgage, abstracts and all other papers relating thereto transmitted by mail or express to the mortgagor [at his address] in the state where he resides. The principal of said notes and mortgages when due, and the interest thereon payable semi-annually, are made payable, and are paid [by the mortgagor] chiefly through the mails or express, at the home office of said plaintiff.

Extensions and partial releases are from time to time executed, and together with correspondence in reference to the same are transmitted through the mails between the company at its home office and the parties at their several places of residence.

A large amount of correspondence and the use of the mails, express and other agencies of transportation are required in connection with and as a part of the business of making such real estate loans, the procuring, renewing and transmitting of fire insurance policies on the buildings situated on the mortgaged premises, the [annual] procuring and transmission of payments and receipts for taxes thereon, the [semi-annual] payments of interest, and of the principal of said notes and mortgages, and various other matters necessary to the protection of the company's
167 investments.

On the 31st day of December, 1911, said company had outstanding [21,208] loans secured by real estate mortgages in various states to the amount of \$153,562,654.39, all of which were in states other

than Wisconsin except [494 loans amounting] to the sum of \$5,654,369.10.

(4) Said plaintiff has from time to time acquired and held real estate located in various states other than Wisconsin, which real estate has been mortgaged to it in good faith by way of security for loans or in satisfaction of debts previously contracted in the course of its dealings, which real estate was and is, under direction from the home office, managed and rented by local agents employed by it who receive rents therefrom, pay the taxes and procure fire insurance thereon, and from time to time make sales thereof, all of which negotiations and transactions were and are carried on between said persons so employed and the proper officers at the home office through the mails and by telephonic and telegraphic communications and other methods of intercourse, as occasion requires.

(5) Said plaintiff has for many years invested a portion of its reserve funds in municipal and railroad mortgage bonds by purchasing the same through various parties residing and having their places of business in states other than the State of Wisconsin; the negotiations for which purchase have been largely through correspondence by mail, and when closed the bonds have been transmitted by mail or express from such parties residing in states other than Wisconsin to the home office of the company. Payments for said bonds are sent by mail or express from said home office to the said parties from whom the same had been purchased.

The principal and interest upon said bonds are paid at the home office of the company, remittances therefor being chiefly sent through the mails or by express from the parties located or residing in various states other than the State of Wisconsin, [such remittances of interest being usually preceded by the forwarding by mail or express to the non-resident bank or fiscal agency at which the bonds are made payable of the semi-annual interest coupons representing the interest upon the bonds.]

[That the bonds purchased by the plaintiff are chiefly purchased in the open market, and that in the conduct of its business, the plaintiff may be from time to time required to sell in the open market bonds in which it has invested as aforesaid.]

[That the amount of bonds owned by plaintiff on the 31st day of December, 1911, was the sum of \$73,185,385.00, all of which were payable outside the State of Wisconsin.]

169 [That in many of the states where the plaintiff transacts business, laws exist which require the advancement by the plaintiff of a certain percentage, usually upwards of 90%, of the reserve creditable to any policy, to the holder of such policy upon request, and that to meet the demands of policyholders in virtue of such laws, and of their contracts of insurance, it is necessary that the plaintiff at all times have on hand a very considerable amount of readily convertible securities; and that the necessity of maintaining such readily convertible securities, as well as the keeping of its funds invested, requires the making of bond investments as aforesaid.]

[(6) That attached hereto as Table I, and made a part hereof, is a table entitled "Mortgage Loans," which set forth the total amount

of real estate mortgage loans made by the plaintiff during the year 1911; the amount thereof made to residents of, and secured by real estate outside, the State of Wisconsin; the total amount of mortgage loans collected during such year; the amount thereof collected from parties outside the State of Wisconsin; the total amount of interest collected (in semi-annual installments) upon mortgage loans during such year; and the amount thereof collected from parties outside the State of Wisconsin; and that there is also embraced in said table, under the title "Bonds," and made a part hereof, similar facts as regards the bond investments of plaintiff for said year 1911.]

170 Sixth. The plaintiff for many years last past has had and now has a large amount of permanent and valuable property at its home office and elsewhere in the State of Wisconsin upon which it has annually paid the taxes required by the laws of said state, [the real estate taxes so paid by it in the year 1911 having been the sum of \$19,001.38.]

Seventh. In the carrying on of all its operations, said plaintiff employs the same method, instrumentalities and agencies for both state and interstate business without separation thereof by the limitations of state lines in its prosecution, and without any separate license from said state to transact its business with residents thereof and without any requirement by said state to separate and report for taxation the income or receipts derived from its domestic business.

[That the investment expenses incurred during the year 1911 in the conduct of plaintiff's business was the sum of \$755,764.18. That more than 95% of such investment expense was incurred in carrying on that portion of plaintiff's investment business transacted with residents of States other than Wisconsin.]

The greater part of the business of said plaintiff both in the selling of life insurance and in the investment of its funds and the collection of interest and income upon such investments has for many years been and is now being done substantially in manner and form as aforesaid, all of which business with residents of states other

171 than Wisconsin, as plaintiff is informed and believes, constitutes interstate intercourse or commerce among the several states within the meaning of that clause of Article 1, of Section 8, of the Constitution of the United States, which invests the Congress with power to regulate commerce among the several states, and over which business said defendant has no control or authority and which it has no right to control, restrict or burden.

That the proportionate part of the business so transacted by said plaintiff through commercial intercourse with residents of states other than Wisconsin was on December 31, 1911, approximately as follows:

1. Of the total number of policies in force, more than 90%;
2. Of the total amount of insurance in force, more than 92%;
3. Of the total real estate mortgage loans, more than 96%;
- [4. Of the total amount of bonds, more than 95%;]
5. Of the total amount of outstanding policy loans or advances, more than 93%;

6. Of the total payments in 1911 for death losses and endowments, more than 93%.

7. Of the total gross receipts from all sources in 1911, more than 93%.

8. Of the total premium receipts for the year 1911, more than 92%.

Eighth. Said plaintiff further alleges that the legislature of the State of Wisconsin passed an act which was published and went into effect on the 17th day of July, 1907, known as Chapter 656, of the Laws of Wisconsin for the year 1907, entitled, "An Act to Amend Section 1220 of the Statutes, as amended, relating to fees of life insurance companies," which act is in words and figures as follows:

"Life Companies—Annual License Fee.

"Section 51.32 (formerly Section 1220). Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

"Domestic companies. (1) If such company, corporation or association is organized under the laws of this state, and it is not purely an assessment or stipulated premium plan company under chapter 270, Laws of 1899 (Sec. 1955-1), three per centum of its gross income from all sources for the year ending December 31st, next prior to said first day of March excepting therefrom income from rents of real estate, upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the State of Wisconsin on policies held by non-residents of the State of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured.

173 "Foreign Companies. (2) If any such company, corporation or association is organized without the State of Wisconsin, and is not purely an assessment company, it shall pay into the state treasury, as such annual license fee the sum of three hundred dollars, except that whenever the similar taxes and fees imposed upon a company of another state under Section 1221, shall exceed three hundred dollars, the amount of the annual license fee shall be deducted."

That in the year 1907 and thereafter and including the years 1911 and 1912, there was in force the following statutes of the State of Wisconsin, to wit:

"Section 51.32 (3) (formerly Section 1220a). Every other such association, corporation or company doing business within this state, whether organized within or without the state, including all assess-

ment companies and associations, and stipulated premium plan companies under Chapter 270, Laws of 1899, (Sec. 1955-1), and excepting only such fraternal organizations as are hereinbefore specified, shall on or before the first day of March, in each year, pay into the state treasury of the state as an annual license fee, the sum of three hundred dollars."

"Section 51.32 (4) (formerly Section 12206). Such license, when granted shall authorize the company, corporation or association to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company, corporation or association."

174 "Section 51.33 (formerly Section 1221). Whenever the laws of any other state of the United States shall require of life, fire, accident, or inland navigation insurance companies organized under the laws of this state and doing business in such other state any deposit of securities for the protection of their policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by the laws of this state for the same purposes from similar companies organized under the law of such other state and doing business in this state, then all such companies of such other states doing business within this state shall make the same deposit with the state treasurer and shall pay him the same sum for taxes, fines, penalties, certificates of authority, license fee or otherwise as a condition to the issue of a license to them as is required to be paid by the laws of such other state."

"Section 51.34 (formerly Section 1222). The license herein provided for shall certify to the fact of the payment of the license fee, be attested by the great or lesser seal thereto affixed, and shall be in such form as shall be approved by the attorney general."

Section 1947, as amended, Section 5:

"No life insurance corporation whatever shall do any business in this state, nor shall any person act as agent or otherwise within this state in receiving or procuring applications for life insurance or in any manner aid in transacting such business for any such corporation until it shall have first procured a license from said commissioner authorizing it to issue policies of insurance in this state and have paid therefor the license fee required to be paid by Section 1220. * * *

175 Section 1948 as amended:

"Section 1948. No company shall transact business in this state until it shall have obtained a license therefor from the commissioner of insurance.

"No such license shall be issued until the company has complied with all the requirements of the laws of this state, nor until after such examination as he may require, the commissioner is satisfied that its assets are properly and safely secured and exceed its liabilities, valuing its policies as provided by the laws of this state.

"Such value shall be computed according to the face or nominal sum named in such policies or certificates of membership, whether payment thereof is absolute and provided for by the collection of fixed premiums or is contingent upon assessments to be levied upon and collected from the members of such corporation or company."

[Section 1951 as amended:

"Section 1951. Every life insurance company organized under the laws of this state, may invest its funds and accumulations in stocks or bonds of the United States or of this state, or of any county, city, town, or village, or duly organized school district therein, or in mortgages being first liens on real estate whether held in fee, or as leasehold running not less than twenty-five years, or in fee subject to leasehold, worth at least twice the money loaned thereon, or in the mortgage bonds of any railway or street railway company duly incorporated and organized under the authority of this state; and it may also make loans on the security of promissory notes amply secured by pledge of any of the bonds in which such insurance corporations are hereby authorized to invest their funds, and every

176 such corporation may not only loan to its policyholders, sums not exceeding one-half of the annual premiums on their policies, upon note to be secured by the policies of the persons to whom the loans may be made, but may also make loans upon the security of its own policies to an amount, which with other indebtedness and unpaid instalments of the premium and interest to the next policy anniversary shall not exceed the surrender value specified in the policy, and such corporation may invest its funds in other states, organized territories of the United States, and the District of Columbia, on like securities and under the same restrictions as in this state. No life insurance corporation organized under the laws of this state shall issue policies insuring fire, marine, accident, or live stock risks, nor do any banking business, except as otherwise provided by law."]

That [the Statutes aforesaid] provide the method and the only method relating to the payment of license fees or taxes by all corporations and associations doing the business of furnishing life insurance in the State of Wisconsin.

[That in the year 1907 there was and ever since has been in force in every state of the United States under whose laws any life insurance companies have been organized which have been licensed to transact business in Wisconsin, statutes similar to Section 51.33 Wisconsin Statutes above quoted.]

[Ninth. That the plan of life insurance upon which the business of plaintiff is based is what is called the old line or level premium plan. That such plan is distinguished from other plans of life insurance in that the contract which the company issues is in consideration of a guaranteed premium specified in the contract, and which is not subject to modification or change, except by mutual consent of the parties to the contract. That in the contracts of insurance issued by plaintiff, the losses or benefits to be paid in consideration of the fixed premiums specified are likewise absolute, and not subject to change except by the mutual consent

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of the parties to the contract. That in determining the amount of premium to be charged and collected from a policyholder, it is essential that there should be taken into consideration the cost to the plaintiff which will accrue upon the happening of the event of which the loss is payable, the probable time at which such loss will become payable, and the amount of the accumulation which will accrue from the investment of the premium collected. That what such accumulations will be, and how far they may be relied upon to meet the losses stipulated in the policies, and the operating expenses of the company, depend on the ability of the company to invest its premium and other income, and the rate and terms upon which it may be thus invested. That without the ability to freely invest its funds upon advantageous rates and terms, the conducting of a life insurance business by plaintiff would be wholly impossible. That by its said articles of organization the plaintiff was and is

authorized to issue its policies and to make such investments
178 within the State of Wisconsin and within any other state or territory of the union, and that in the conduct and building up of its business, the plaintiff has, throughout its existence, availed itself of its right to thus invest its funds within any of such states, and that the contracts which it has entered into for the payment of indemnity or death losses have been made upon the faith of such right, and that of such contracts made in reliance thereon, the plaintiff had outstanding on the 31st day of December, 1911, the sum of \$1,147,273,523, as hereinbefore alleged. That the right of the plaintiff to thus invest its funds throughout the Union, upon the faith of which right it has issued its contracts as aforesaid, was during the year 1911, for many years prior thereto and ever since has been recognized by the laws of the State of Wisconsin. That the laws of such State, as well as of other states in which plaintiff transacts business, impose upon plaintiff the obligation to maintain a reserve for the meeting of its contracts, which reserve can only be maintained by the investing of its funds as aforesaid. That to preclude the plaintiff, by onerous tax burdens or otherwise, from carrying on its business, including its policy business, in the State of Wisconsin, under whose laws it is organized and where its principal and home office is located, would necessarily embarrass and jeopardize, if not prevent, the successful prosecution and carrying
on of the business of plaintiff in other States and Territories.]

179 [Tenth. (1) That during the year 1911, as well as before and since, there were numerous insurance corporations, organized in States other than Wisconsin, which were transacting the business of life insurance within said State upon the old line or level premium plan, some of which companies were mutual companies of precisely the same character as plaintiff. That during said year, as well as before and after, there were also transacting business in Wisconsin a number of other insurance corporations organized under the laws of said State, and transacting business upon the old line or level premium plan, and that some of said corporations were not and are not transacting business in other states having insurance corporations which transact business in Wisconsin.]

[That all of said old line or level premium companies, including both those organized under the laws of Wisconsin and those organized under the laws of other States, transact a life insurance business of the same kind and character as the plaintiff, and, except as to taxation, are, by the laws of Wisconsin, subject to like state regulation and supervision.]

[That during said year 1911 the plaintiff, under the statutes aforesaid, was required to pay as a condition of transacting its business within the State of Wisconsin, three per cent of its gross income from all sources except rents of real estate and except premiums collected outside the State on policies held by non-residents of the State, and that during said year said other domestic level premium companies, including those not transacting business in other states having companies transacting business in Wisconsin, paid license fees on the like basis, as a condition of transacting business in Wisconsin; and that during said year the foreign companies were required to pay, as a condition of transacting insurance business in Wisconsin like to that transacted by said domestic companies, a license fee of \$300 each plus such, if any, additional amount as would result from the application to any of them of the same standard of taxation imposed by the laws of the State of organization upon like Wisconsin companies there transacting business.]

[That attached hereto as Table II, and made a part hereof, is a table showing the total amount of the policies of plaintiff outstanding at the end of such year; the total amount of Wisconsin policies of plaintiff outstanding at the end of such year; the total amount of policies issued by the plaintiff during such year; the total amount of policies issued by the plaintiff to citizens of the State of Wisconsin during such year; the total amount collected by plaintiff for premiums during such year; the total amount of Wisconsin premiums collected by plaintiff during such year; the total amount of plaintiff's income from mortgages, bonds, and policy loans and liens during such year; the total amount of plaintiff's Wisconsin investment income (including interest on Wisconsin mortgages and on so-called policy loans to residents of Wisconsin, but excluding interest on bonds, all bonds owned by plaintiff being payable outside of the State of Wisconsin) during such year; and the amount of the license fee paid by plaintiff to the State of Wisconsin for said year; also the like facts, save as to Wisconsin investment income, which facts plaintiff has been unable to obtain, as to the aggregate of all other domestic level premium companies transacting business in Wisconsin during such year; also the like facts, with said exception, as to the aggregate of all foreign level premium companies transacting business in Wisconsin; and also the like facts, with said exception, as regards the New York Life Insurance Company, which is a New York corporation, a mutual company like the plaintiff and the foreign company having the largest Wisconsin business of all foreign companies similar in character to the plaintiff; also the various percentages which the amount of the license fees embraced in said table bear to the Wisconsin premiums

collected, and to the sum of the Wisconsin premiums and Wisconsin investment income collected.]

[(2) That during the year 1911, as well as before and after, there were licensed to transact business and transacting business within the State of Wisconsin a large number of incorporated fraternal associations having large organizations, and insuring the lives of their own members, some of which were organized
182 under the laws of other States; that, as more particularly appears from the Tables hereafter referred to, the bulk of insurance business transacted during such year by Wisconsin associations was transacted by a small number of associations, and that the bulk of the business transacted by the foreign associations was transacted by a small number of such associations.]

[That there is attached hereto, as Table IV, and made a part hereof, a table showing, for the year 1911, as to each and all of the Wisconsin fraternal associations transacting business in Wisconsin during said years, the total amount of fraternal benefit certificates which said associations had in force at the end of the year, the total amount of such certificates running to Wisconsin residents which were in force at the end of the year, and the total amount of such certificates issued in Wisconsin during the year.]

[That there is attached hereto as Table VI, and made a part hereof, a table showing, for the year 1911, the total amount of fraternal benefit certificates, issued by all associations, domestic and foreign, transacting business in Wisconsin, (the total number of such associations being 64), which were in force at the end of the year, and the total amount of such certificates running to Wisconsin residents which were in force at the end of the year, and the total amount of such
183 certificates issued in Wisconsin during the year, and showing also the same facts as to each of ten of the larger and more important of such associations (the same being foreign associations) which were transacting business in Wisconsin in said year.]

[(3) That during the year 1911 there were no domestic assessment or stipulated premium companies transacting business in Wisconsin, but that during said year there were three foreign assessment companies, (organized as corporations in other states than Wisconsin) transacting business in Wisconsin, one of which companies is still transacting business therein.]

[That attached hereto as Table VIII, and made a part hereof, is a table showing, for the year 1911, as to each of said foreign assessment companies, the total amount of its outstanding insurance at the end of the year, and the amount thereof running to residents of Wisconsin, and the amount of insurance written or issued in Wisconsin during such year.]

[That none of said assessment companies has any lodge or ritual system, and that none of them is organized for social, benevolent or charitable purposes, and that the activities of each are confined to the transaction of the insurance business upon the mutual and assessment plan.]

(4) That the essential and predominant feature of all [the insurance] companies [and associations hereinbefore referred to] is the

184 same, being the payment of a definite sum to a designated party or beneficiary on the death of the person whose life is insured; that the presence or absence of social, charitable, benevolent or lodge features in the organization, or the particular plan or method of organization, or the place of organization of the corporation, or association, whether under the laws of the State of Wisconsin or under the laws of any other state, is not a distinguishing feature in the life insurance business, nor does any such or similar distinction form a basis for a classification of such companies so as to justify a discrimination in the standard and method of taxation to be imposed upon them.

[That during said year 1911, and ever since said time, the statutes of Wisconsin precluded the incorporation or licensing to transact business within the state of fraternal and assessment associations unless their by-laws require (1) the collection of prescribed minimum rates of assessment, and (2) the maintenance of a substantial reserve; and said statutes have during all said time required the investment of their assets in such securities as are prescribed for other life insurance companies, provided for the valuation of their policies, and subjected them to certain other regulatory requirements similar in nature to those imposed upon level premium companies, and that the nature, scope and extent of state supervision has, during all such time, been substantially the same as regards all companies or associations, transacting the insurance business in Wisconsin, irrespective of the place of organization or of the particular plan upon which such business was carried on.]

185 [Eleventh. That the statutes aforesaid prescribing the license fees to be paid as a condition upon the transacting of the business of life insurance in Wisconsin not only unjustly, arbitrarily and unlawfully discriminate as between plaintiff and foreign level premium companies, and as between plaintiff and assessment and stipulated premium companies, both domestic and foreign, and as between plaintiff and fraternal associations, both domestic and foreign, but that the rate and standard of the burden imposed upon plaintiff by such statutes, and exacted from it as a condition of transacting its business in Wisconsin, as herein alleged, is unjust and inequitable, as compared with the tax burdens of others imposed in Wisconsin, as now more particularly set forth:]

[(1) That domestic level premium life insurance companies are the only insurance companies or associations, of any kind, transacting business in Wisconsin, whether assessment, stipulated premium or fraternal life insurance companies, or fire, navigation, casualty, suretyship, or title guaranty insurance companies, as to which an unequal rate of taxation is or has even been applied as between those organized within and those organized without the State of Wisconsin; and that as to no kind or character of corporation transacting business in Wisconsin, and taxed on the license fee basis, except level premium life insurance companies, has any difference been as made, between foreign and domestic companies, with respect to the rate or standard of taxation.]

[That as to no insurance company, except level premium com-

panies like the plaintiff, do the laws of Wisconsin attempt to impose any tax upon income, earnings or receipts from without the state; that fire, navigation, casualty, suretyship and title guaranty companies are taxed upon the basis of 2% of receipts from Wisconsin business only, and that it is not now true and never has been true, in Wisconsin, as to any corporation, whether insurance corporation, railroads, sleeping car companies, telephone companies or others, that they have ever been taxed upon earnings or receipts derived from without the state.]

[(2) That, as more fully appears from Table IX, hereto attached and made a part hereof, the fee exacted from plaintiff for the privilege of transacting business in Wisconsin for the year 1911 was nearly twice as great as the combined license fee for such year paid for the like privilege by all other life insurance companies and associations, of whatever kind, and by all surety and accident, assessment accident, fire, marine, hail and cyclone, and all other companies transacting the insurance business in said state of every kind whatsoever.]

187 [(3) That, as more fully appears by Table X attached hereto and made a part hereof, the license fee paid by plaintiff under the statutes aforesaid, for the year 1911 amounted to .17% of the gross personal assets of plaintiff, exclusive of real estate and without deduction for liabilities, and to 16.9% of its Wisconsin premiums collected, whereas the combined license fees paid by the largest domestic fire insurance companies as a condition of transacting their fire insurance business within said state during such year constituted but .088% of their gross personal assets, and only 2.031% of their Wisconsin premiums collected.]

[(4) That prior to 1911 the expenses of government in Wisconsin were largely met by direct taxes upon real estate and personal property; that in the taxation of personal property known as credits, such as notes, bonds, mortgages and other evidences of indebtedness, the laws of the state have always provided for a deduction to the extent of the owners' outstanding debts; that under the laws of the state the plaintiff has been required to accumulate and hold funds properly and safely invested and secured to provide for its reserve liability, which reserve liability is the present value of its outstanding policies, valued as required by law; that the funds thus required to be invested and secured to cover the reserve liability of plaintiff constitute a trust fund for the benefit of the policyholders of plaintiff

188 to insure payment of the policies as the same mature, and that in virtue of the laws of the state and of the contracts issued by plaintiff, upwards of 90% of such reserve is subject to be called for at any time by its policyholders; that such reserve liability of plaintiff on December 31, 1911, amounted to \$252,924,714.00, of which \$234,241,288.00 was held to provide for such liability to policyholders of states other than Wisconsin; that the total amount of all liabilities of plaintiff on December 31, 1911, including such reserve liability, was \$279,508,086.41, which sum, together with the further sum of \$8,067,133.03 of unassigned surplus, a total of \$285,575,219.44 constituted the total amount of plaintiff's

liabilities on December 31, 1911, and equaled the total amount of plaintiff's assets of all kinds on said date; and that the total assets of plaintiff on December 31, 1911, exclusive of real estate and without deduction for liabilities, was \$283,468,970.69.]

[(5) That personal property taxation in Wisconsin was largely superseded in the year 1911 by the adoption of an income tax law by which the net business incomes of individuals and corporations were taxed in lieu of a tax upon personal property; that since the year 1911 owners of credits similar to those owned by plaintiff have not been assessed or taxed by a personal property tax but have been assessed and taxed on account of such ownership solely by said income tax law which imposed a tax only on the net income

189 derived from such credits by the owners thereof. That the income of banks, trust companies and building and loan associations and income derived from property by corporations required to pay taxes or license fees directly into the treasury of the state in lieu of taxes were and are, by the terms of said income tax law, expressly exempt from taxation under said law. That by reason of said provisions of said income tax law, neither banks, trust companies, building and loan associations, telephone companies nor insurance companies are, or ever have been, subject to said income tax law. That no law has ever been enacted by any state of the United States, other than Wisconsin, which imposed a tax on the gross or net business or investment income of life insurance companies.]

[That on August 5, 1909, the Congress of the United States enacted Section 38 of the Act of August 5, 1909, known as the Special Excise Tax, which imposed on corporations, joint stock companies, associations and insurance companies a tax upon the entire net income over and above \$5,000 received by such corporations from all sources during any year. That said law was superseded in 1913 by the United States Income Tax Law, enacted October 3, 1913, which imposed a tax upon the entire net income of all persons and corporations, including insurance companies. That both of said

190 laws provided that the net income of insurance companies should be ascertained by deducting from their gross receipts, all the ordinary and necessary expenses of conducting the business, all losses sustained, the net addition required by law to be made within the year to reserve funds and the sums other than dividends paid on policy and annuity contracts, and that said Income Tax Law provided that such portion of premiums received from policy holders as should have been paid back or credited to them or treated as abatements of premiums, should not be included as income. That plaintiff has been assessed and taxed pursuant to said laws, in the years 1911, 1912, 1913 and 1914, as shown by the following table:

	Taxable income.	Amount of tax.
1911.....	\$3,180,152.81	\$31,801.53
1912.....	3,084,995.11	30,849.95
1913 (10 Mos.).....	13,153.62	131.57
1914.....	257,868.68	2,578.69]

[Twelfth. That ever since the enactment of said Section 51.32 (formerly Section 1220) Wisconsin Statutes 1915, in 1899, plaintiff has *has* sought to secure relief from the excessive taxes imposed thereby. That the Tax Commission of Wisconsin, a body created in 1897 with the duty, among others, to formulate and recommend legislation relating to taxation, as early as 1901 announced its disapproval of the principle of said law and has repeatedly since that time advocated the passage of bills by succeeding legislatures which would have greatly reduced the taxes exacted from plaintiff.

191 That the earnest protests of plaintiff and other domestic life insurance companies that the law was unjustly burdensome on some domestic life insurance companies, caused the legislature of 1909 to pass a joint resolution directing the Tax Commission to make a thorough and complete investigation of the subject of taxing life insurance companies and to report its conclusions to the 1911 legislature. That the Tax Commission made such investigation and report and submitted same to the legislature of 1911 and recommended the passage of a bill imposing on life insurance companies a license fee of five per cent on the Wisconsin proportion of the gross income of each company (except rents from real estate and premiums), such proportion of gross income to be determined by the ratio of outstanding insurance on the lives of residents of the State of Wisconsin to the total amount of outstanding insurance on the lives of all policyholders.]

[That the bill so recommended by the Tax Commission for passage was introduced in the legislature of 1911 and vigorous efforts made to have the same passed by the legislature, but said bill failed of passage. That said bill was again presented to the legislature of 1913 and its passage urged, but it again failed of passage. That plaintiff's taxes under said bill would have been each year only about one quarter of the amount exacted from plaintiff under the provisions of Section 51.32 (formerly Section 1220) Wisconsin Stat-

192 utes. That although plaintiff has long believed that said law was violative of its constitutional rights, it delayed the commencement of any action to have said law declared unconstitutional and void until after the efforts of said Tax Commission had failed to secure any modification of said Section 51.32 Wisconsin Statutes.]

Thirteenth. Said plaintiff further alleges that its taxable income from all sources for the year ending December 31, 1911, was claimed on behalf of said defendant to be as follows:

1. All premiums except premiums collected outside of the State of Wisconsin on policies held by non-residents of the State of Wisconsin, no deduction being made from premiums whether paid in cash or premium notes on account of dividends allowed or paid to the insured.....	\$2,836,488.04
2. Interest on real estate mortgages.....	7,446,393.10
3. Interest on bonds.....	3,172,489.58
4. Interest on bank deposits.....	73,735.15

5. Interest on premiums collected in the conversion of term policies and in the restoration of lapsed policies	65,730.11
6. Interest on agent's indebtedness.....	1,795.17
7. Gross discount on claims paid in advance.....	18,281.01
8. Gross interest on premium notes, policy loans or liens, item 26, income.....	2,163,808.84
9. Interest included in deferred quarterly and semi-annual premiums, item 29, income.....	294,386.76
amounting to the sum of.....	<u>\$16,073,107.76</u>

193 including the item of so-called "Gross interest on premium notes and policy loans or liens" amounting to the sum of \$2,163,808.84, and also the item of "Interest included in deferred quarterly and semi-annual premiums" amounting to the sum of \$294,386.76. On the other hand, said plaintiff claimed that the amount of its taxable income for said year 1911 did not exceed the sum of \$13,614,912.05, and that there should be deducted from the amount claimed on behalf of said state as the taxable income for said year the said above named two items amounting to \$2,458,195.60.

That said plaintiff further claimed that the law requiring the payment of such license fee or tax on the amount of its gross income was unconstitutional and void, and that it was therefore entitled to receive an annual license from the State of Wisconsin to do business on and after the 1st day of March, 1912, without the payment to the state or its treasurer or its insurance commissioner of the amount claimed to be due on the part of said defendant, or of any license fee or tax imposed under the provisions of the laws of Wisconsin hereinbefore set out.

That plaintiff's said claim, as heretofore itemized, as to what constituted its income for the year 1911, taxable under Chapter 656, Laws of 1907, was made to the Commissioner of Insurance of the State of Wisconsin, in the form of written statements delivered to said Commissioner on or about March 1, 1912, which state-
194 ments ever since have been and still are in the correspondence files in the office of said Commissioner.

That thereupon and prior to the 1st day of March, 1912, said defendant by its commissioner of insurance and the state treasurer demanded, and so notified said plaintiff, that it must pay a license fee or tax on the sum of \$16,073,107.76, and in case of its refusal to pay the license fee or tax of 3% upon the amount aforesaid he would withhold any license to the company to transact business from and after the 1st day of March, 1912, and would refuse to permit said plaintiff on and thereafter to transact any business in the state.

That thereupon and on or about the 29th day of February, 1912, the plaintiff paid under protest into the treasury of the State of Wisconsin the amount of 3% on the said sum so claimed as taxable income, \$16,073,107.76, amounting to \$482,193.23, a copy of said protest being hereto attached and made a part of this complaint and marked "Exhibit A."

Fourteenth. The plaintiff further alleges that said license fee or tax so paid was and is excessive, illegal and void, and the amount so paid should be refunded by said defendant, for that:

1st. The payment thereof was made involuntarily and under duress and only because of threatened proceeding to enforce collection of such license fee or tax by imposing penalties prescribed by the statutes of Wisconsin and by withholding the issue of a 195 license to said company and its agents to transact business until it should have made payment of said amount as a license fee or tax.

2d. Said Chapter 656 of the Laws of Wisconsin of 1907 was and is unconstitutional and void in that it violates Article 1, Section 1, and Article 8, Section 1, of the Constitution of Wisconsin, and also Article 14, Section 1, and other provisions of the Constitution of the United States by denying the equal protection of the law to said plaintiff and all other persons similarly situated and by infringing the rule that taxation shall be uniform.

3d. Said Chapter 656 of the Laws of Wisconsin of 1907 was and is unconstitutional and void in that it violates the provisions of Article 1, Section 8, and other provisions of the Constitution of the United States providing that Congress shall have the power to regulate commerce among the several states in that it imposes a tax or burden on interstate commerce and upon commercial intercourse between said plaintiff and citizens and residents of states other than Wisconsin in carrying on the business authorized and required to be carried on by said plaintiff.

4th. That the payment required by and on behalf of the defendant was and is based upon an arbitrary and excessive tax which was and is void in that it discriminates against the said plaintiff and in favor of other corporations and associations authorized to 196 transact and transacting a similar business in the State of Wisconsin.

5th. That the classification of life insurance companies under the provisions of the laws of Wisconsin for the purpose of imposing said license fee or tax was and is arbitrary, discriminatory and unjust and violates the rule that "all persons subject to such legislation shall be treated alike," and that any classification to be legal must be rational and founded upon real differences in situation and condition and in liabilities imposed.

Fifteenth. Said plaintiff further alleges that on or about the 17th day of February, 1913, it duly presented its claim in duplicate against the state for the amount of \$482,193.23 with interest thereon from the 29th day of February, 1912, specifying the nature and particulars thereof, verified by the oath of the president of said plaintiff in writing, and filed the same in the office of the secretary of state of said state, a copy of which claim is hereto attached, marked Exhibit "B," and made a part of this complaint. That thereupon the said claim was submitted to the legislature of the State of Wisconsin and such proceedings had thereon that a joint resolution was passed by the senate and assembly of said legislature reject-

ing and disallowing the said claim of this plaintiff and each and every part thereof, the bill introduced into the legislature to appropriate to said plaintiff the amount of its said claim being indefinitely postponed.

197-246 That by reason of the refusal of the legislature to allow said claim against the said defendant the plaintiff deems itself aggrieved and hereby commenced this action to obtain a judgment against the said defendant for such amount of damages and costs as may be ascertained to be due to it, together with interest thereon from the 29th day of February, 1912.

Second Cause of Action.

(Allegations omitted because identical with those of first cause of action, except as to dates and amounts.)

* * * * *

247-263 Wherefore, said plaintiff demands judgment against said defendant for the sum of \$987,836.45 with interest on the sum of \$482,193.23 from the 29th day of February, 1912, and on the sum of \$505,643.22 from the 1st day of March, 1913, together with the costs of this action.

OLIN, BUTLER, STEBBENS & STROUD,
Plaintiff's Attorneys.

STATE OF WISCONSIN,
Milwaukee County, ss:

George C. Markham, being duly sworn says that he is the President of the above named plaintiff, The Northwestern Mutual Life Insurance Company, and makes this verification on its behalf; that he has read the foregoing complaint and verily believes the same to be true; that the reason why this verification is not made by said plaintiff is because it is a corporation; that the grounds of deponent's belief are based upon documents in his possession or under his control, and from investigations made and information received in relation to the matters herein stated as President of said plaintiff

GEO. C. MARKHAM.

Subscribed and sworn to before me this 10 day of March, A. D. 1918.

[SEAL.]

W. J. HOLBROOK,
Notary Public, Milwaukee County, Wis.

My commission expires Feb'y 17, 1918.

(The following tables were not contained in the original complaint.)

TABLE I.

Mortgage Loans.

	Total amount made during year	Amt. made during year outside Wis.	Total amt. collected during year	Amt. coll. during year outside Wis.	Total amt. int. collected during year	Amt. int. coll. during year outside Wis.
1911	\$25,328,086.00	\$22,997,293.00	\$20,505,722.00	\$20,180,134.00	\$7,446,393.00	\$7,180,825.00
1912	25,039,928.00	24,759,040.00	19,420,414.00	19,120,738.00	7,810,896.00	7,541,038.00

Bonds.

	Total amount purchased during year	Amount purchased during yr. outside Wis.	Total amount paid and sold during year	Amount paid and sold during year outside Wis.	Total amount of int. col. during year	Amount of int. col. during yr. outside Wis.
1911	\$7,155,000.00	\$7,155,000.00	\$1,450,000.00	\$1,443,000.00	\$3,233,449.95	\$3,232,974.95
1912	5,003,000.00	5,003,000.00	563,500.00	557,500.00	3,442,198.49	3,442,048.49

TABLE II.

1911.

	N. W. Mut. Life Ins. Co.	All other domestic level premium companies.	All foreign level premium companies transacting business in Wis.	N. Y. Life Ins. Co.
Total amt. of policies outstanding at end of year.....	\$1,147,273,523.00	\$9,490,761.00	\$7,861,035,146.00	\$2,102,105,746.00
Total amt. of Wis. policies outstanding at end of year.....	85,149,148.00	8,875,915.00	148,364,146.00	33,980,353.00
Total amt. of policies issued during year.....	120,986,473.00	5,195,233.00	1,281,436,288.00	190,268,551.00
Total amt. of Wis. policies issued during year.....	10,923,240.00	4,943,566.00	26,998,392.00	3,164,991.00
Total amt. of premiums collected during year.....	40,421,263.00	290,738.00	268,865,873.00	83,254,524.00
Total amt. of Wis. Premiums collected during year.....	2,836,488.00	272,415.00	4,327,557.00	1,119,410.00
Total income from mortgages, bonds and policy loans collected during year.....	12,802,691.00	94,805.00	60,963,727.00	27,527,043.00
Total income from Wis. mortgages, bonds and policy loans collected during year.....	415,163.00			
Amt. of Wis. license fees paid for year.....	482,193.00	7,352.00	27,095.00	10,283.00
Percentage of Wis. license fees to Wis. premiums.....	17 %	2.7%	.6%	.9%
Percentage of Wis. license fees to Wis. premiums and Wis. income from bonds, mortgages and policy loans.....	14.8%			

TABLE III.

1912

	N. W. Mut. Life Ins. Co.	All other do- mestic level premium companies.	All foreign level premium com- panies transacting business in Wis.	N. Y. Life Ins. Co.
Total amt. of policies out- standing at end of year.....	\$1,229,377,814.00	\$14,609,417.00	\$3,369,937,275.00	\$2,169,798,993.00
Total amt. of Wis. policies outstanding at end of year	93,424,890.00	13,157,436.00	161,601,235.00	35,659,295.00
Total amt. of policies issued during year.....	138,695,883.00	7,207,970.00	1,348,919,705.00	212,594,538.00
Total amt. of Wis. policies issued during year.....	13,714,000.00	6,194,955.00	29,610,906.00	3,667,222.00
Total amt. of premiums col- lected during year.....	43,599,141.00	422,629.00	286,015,942.00	85,941,784.00
Total amt. of Wis. premiums collected during year.....	3,086,048.00	332,230.00	4,830,955.00	1,203,317.00
Total income from mort- gages, bonds, and policy loans collected during year	13,581,035.00	101,756.00	68,377,370.00	30,726,318.00
Total income from Wisconsin mortgages, bonds and pol- icy loans collected during year.....	423,852.00			
Amt. of Wis. license fees paid for year.....	505,643.00	11,259.00	26,829.00	10,964.00
Percentage of Wis. license fees to Wis. premiums.....	17.1%	3.4%	.6%	.9%
Percentage of Wis. license fees to Wis. premiums and Wis. income from bonds, mortgages and policy loans	14.4%			

TABLE IV.

1911.

Wisconsin Associations	Total amt. of certificates in force at end of year	Total amt. of Wis. certificates in force at end of year in Wis. during yr.	Total amt. of certificates issued
Aid Ass'n for Lutherans in Wisconsin and other states.....	\$ 7,535,500.00	\$ 5,081,350.00	\$ 499,750.00
Beaver Reserve Fund.....	16,262,000.00	15,890,600.00	2,072,800.00
Bohemian A. C. C. U. of Wis.....	885,100.00	79,000.00	27,100.00
Catholic Family Protective Ass'n.....	1,121,108.60	1,121,108.60	146,100.00
Equitable Fraternity Union.....	39,990,000.00	29,000,500.00	2,562,500.00
Farmers Life Ins. Ass'n.....	1,595,500.00	1,595,500.00	592,500.00
Fraternities Reserve Ass'n.....	13,566,000.00	9,595,000.00	2,065,000.00
Fraternities Order of Kangaroos.....	6,211,431.00	194,000.12	57,848.04
G. U. G. Germania.....	6,371,779.00	6,371,779.00	102,750.00
Good Templars Mut. Ben. Ass'n.....	129,205.55	65,162.50	300.75
Grand Lodge Knights of White Cross.....	443,250.00	119,250.00	10,000.00
Independent Sons of Workingmen's Ass'n.....	9,695,100.00	2,243,000.00	306,000.00
National Fraternal League.....	3,548,309.50	3,548,309.50	630,350.00
Order of Hermann's Sons.....	5,775,580.00	775,350.00	1,350.00
Polish Ass'n.....	5,961,500.00	2,318,650.00	14,750.00
Supreme Assembly of the Defenders.....	449,150.28	449,150.28	197,299.19
United Aid.....	690,000.00	650,000.00	26,500.00
United Order of Foresters.....	13,540,985.00	4,771,200.00	477,500.00
Wis. Widow & Orphan Donation Soc.....	260,906.00	260,906.00	
Total.....	\$166,439,093.73	\$88,982,754.80	\$9,880,337.98

TABLE V.

1912.

Wisconsin Associations			
	Total amt. of certificates in force at end of year	Total amt. of Wis. certificates in force at end of year	Total amt. of certificates issued in Wis. during yr.
Aid Ass'n for Lutherans in Wisconsin and other States.....	\$ 7,404,300.00	\$ 5,555,000.00	\$ 151,250.00
Beaver Reserve Fund.....	17,146,200.00	16,682,600.00	2,793,600.00
Bohemian R. C. C. U. of Wis.....	878,200.00	793,100.00	14,100.00
Catholic Family Protective Ass'n.....	1,199,749.43	1,199,749.43	150,000.00
Equitable Fraternal Union.....	40,361,375.13	28,520,108.04	1,956,000.00
Farmers Life Ins. Soc.....	1,803,500.00	1,803,500.00	550,000.00
Fraternal Reserve Ass'n.....	12,753,500.00	9,704,750.00	1,367,760.00
Fraternal Order of Rangers.....	123,046.72	122,003.30	0,000,800.00
G. U. G. Germania.....	7,118,181.00	7,118,181.00	108,625.00
Good Templars Mt. Ben. Ass'n.....			500.75
Grand Lodge Knights of White Cross.....	431,000.00	111,000.00	1,500.00
Independent Seaford Workingmen's Ass'n.....	3,560,000.00	2,470,000.00	330,000.00
National Fraternal League.....	3,499,506.27	3,499,506.27	524,825.00
Order of Herman's Sons.....			
Polish Ass'n.....	5,368,375.00	2,382,450.00	214,350.00
Supreme Assembly of the Defenders.....	382,917.98	382,937.98	70,983.70
United Aid.....	605,500.00	605,500.00	19,000.00
United Order of Foresters.....	13,493,125.00	4,712,000.00	344,000.00
Wis. Widow & Orphans Donation Soc.....			141,520.00
Total.....	\$116,118,696.53	\$85,752,386.02	\$8,767,804.45

TABLE VI.
1911.

	Total amt. of certificates in force everywhere at end of year	Total amt. of Wis. certificates in force at end of year	Total amt. of Wis. certificates issued during year
All associations, domestic and foreign, trans- acting business in Wisconsin.....	\$6,806,826,646.00	\$332,123,883.00	\$34,010,258.98
Modern Woodmen of America.....	1,863,194,000.00	105,213,000.00	6,914,000.00
Woodmen of the World.....	811,712,400.00	5,614,200.00	949,400.00
Royal Arcanum.....	487,992,345.00	6,487,713.00	428,500.00
Maccabees.....	333,885,582.00	7,629,000.00	287,500.00
United Commercial Travelers.....	315,855,000.00	13,935,000.00	1,465,000.00
Foresters.....	242,093,787.00	5,182,319.00	1,209,000.00
Royal Neighbors.....	247,949,500.00	15,644,500.00	1,746,000.00
Modern Brotherhood of America.....	192,666,750.00	9,674,000.00	1,133,500.00
Brotherhood of American Yeoman.....	207,931,500.00	4,951,500.00	1,237,000.00
Travelers Protective Ass'n.....	206,150,000.00	8,230,000.00	1,880,000.00
Total.....	\$4,909,210,864.00	\$182,561,232.00	\$16,249,900.00

TABLE VII.

1912.

	Total amt. of certificates in force everywhere at end of year	Total amt. of Wis. certificates in force at end of year	Total amt. of Wis. certificates issued during year
All associations, domestic and foreign, trans- acting business in Wisconsin	\$6,276,210,964.37	\$310,105,583.69	\$23,908,496.00
Modern Woodmen of America	1,545,759,000.00	87,855,000.00	1,002,000.00
Woodmen of the World	858,591,500.00	6,589,600.00	1,558,800.00
Royal Arcanum	486,661,500.00	6,558,000.00	337,000.00
Maccabees	331,972,045.58	7,560,000.00	448,000.00
United Commercial Travelers	328,405,000.00	14,465,000.00	1,520,000.00
Foresters	241,410,129.00	5,003,145.00	85,500.00
Royal Neighbors	245,706,250.00	15,809,250.00	867,000.00
Modern Brotherhood of America	120,504,750.00	5,757,250.00	96,000.00
Brotherhood of American Yeoman	224,889,000.00	5,928,000.00	1,421,500.00
Travelers Protective Ass'n	211,350,000.00	9,015,000.00	1,375,000.00
Total	\$4,585,229,174.58	\$164,440,245.00	\$8,710,800.00

TABLE VIII.

1911.

	Total amt. of insurance outstanding at end of year	Total amt. of Wis. insurance out- standing at end of year	Total amt. of Wis. policies issued during year
National Life Ass'n.....	\$22,704,000.00	\$ 791,000.00	\$224,500.00
Surety Fund Life.....	11,096,500.00	2,734,500.00	519,500.00
Allen, Scott & F. Ains'n.....	2,080,000.00	223,000.00	45,000.00

1912.

National Life Ass'n.....	\$30,139,500.00	\$ 905,500.00	\$315,000.00
Surety Fund Life.....	11,823,000.00	2,764,000.00	274,000.00

TABLE IX.

License fees paid to State of Wisconsin for years 1911 and 1912 by following corporations transacting business therein.

	1911	1912
1. All Level Premium Life Companies:		
Northwestern Mutual Life Ins. Co.....	\$482,193.23	\$505,843.22
All Other Wisconsin Companies.....	11,134.97	14,638.14
All Companies of Other States.....	24,779.06	30,561.16
2. All Assessment Life Companies.....		
3. All Surety and Accident Companies.....	45,352.91	54,630.28
4. All Assessment Accident Companies.....		202.85
5. All Fraternal Benefit Societies.....		
6. All Fire and Marine Companies:		
Wisconsin Stock Fire Ins. Co.....	12,447.72	12,328.67
Wisconsin Mutual Fire Ins. Co.....	903.88	965.09
All Stock Companies of Other States.....	103,296.87	104,531.69
Mutual Companies of Other States.....	2,225.45	2,558.25
Interinsurers.....	275.99	217.83
Lloyds.....	887.60	913.61
Foreign Marine.....	638.95	725.79
Foreign Fire.....	29,284.42	31,327.39
7. All Hail and Cyclone Companies.....		311.92
All City and Village Companies.....		
All Town Mutual Companies.....		
All Miscellaneous Companies.....		
Life Fund.....	24.98	
Total.....	\$713,446.03	\$759,555.89

TABLE X.

1911.

Company	Total assets less real estate	Wisconsin premiums	Wisconsin license fees	Percentage of license fees to total assets less real estate	Percentage of license fees to Wis. premiums
Northwestern Mutual Life Life Ins. Co.....	\$283,468,970.69	\$2,836,488.04	\$482,193.23	.170	16.999
Three largest Wis. Fire Ins. Cos.....	12,223,601.67	535,250.28	10,873.95	.088	2.031

1912.

Northwestern Mutual Life Ins. Co.....	\$294,909,714.32	\$3,086,048.61	\$505,643.22	.171	16.384
Three largest Wis. Fire Ins. Cos.....	13,092,283.27	528,589.20	10,986.92	.083	2.078

275 (Endorsements:) Filed Mar. 11, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Service of a copy of the within amended complaint admitted this 11th day of March, 1916. W. C. Owen, Att'y for Def't.

276 STATE OF WISCONSIN:

In Supreme Court.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,

v.

STATE OF WISCONSIN, Defendant.

(Demurrer.)

Now comes the above named defendant by Walter C. Owen, Attorney General, and Walter Drew, Deputy Attorney General, its attorneys, and demurs to the amended complaint of the plaintiff herein on the ground that it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action.

WALTER C. OWEN,

Attorney General;

WALTER DREW,

Deputy Attorney General;

Attorneys for Defendant State of Wisconsin.

277 [Endorsed:] State of Wisconsin. In Supreme Court. Northwestern Mutual Life Insurance Company, Plaintiff, v. State of Wisconsin, Defendant. Demurrer. Service admitted 4/20/16.

278-281 (Endorsements:) Original. State of Wisconsin. In Supreme Court. Northwestern Mutual Life Insurance Company, Plaintiff, vs. State of Wisconsin, Defendant. Demurrer. Service admitted April 20, 1916. Olin, Butler, Stebbins & Stroud, Attorneys for Plaintiff. Filed Apr. 20, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wisconsin.

* * * * *

282 In Supreme Court, State of Wisconsin, January Term, 1916.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,

v.

STATE OF WISCONSIN, Defendant.

WINELOW, C. J.:

Pursuant to leave of court an amended complaint has been filed in this action to which the state has demurred and argument has been had thereon.

While many new allegations have been added to the complaint we do not regard the situation as essentially changed. The new allegations, for the most part, merely add details to facts alleged in general terms in the original complaint or assumed to exist by the former decision.

We deem it necessary to refer to but two points which are urged by the plaintiff.

283 The great disparity between the taxation of foreign and domestic level premium companies is very strongly urged and said to be so great as to be manifestly unconscionable and arbitrary. In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the State with regard to the taxation of such property, its liabilities to policyholders, i. e. the present value of its outstanding policies valued as required by law, which is about ninety per cent of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the three per cent license for requirement.

We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as "shall equal the amount of bona fide and unconditional debts by him owing." This provision was repealed by the income tax law which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Session laws 1911 Chapter 858.

It seems entirely clear that the liability to policyholders which the plaintiff refers to is not in any sense an "unconditional debt" and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

As to the contention that if the plaintiff were taxed under the income tax system its tax burden would be far less than under
284 the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.

At all events there does not affirmatively appear to be any such disparity as would condemn the law as arbitrarily discriminatory.

The interstate commerce feature of the case is reargued and the recent case of *K. C. R. Co. vs. Botkin* 240 U. S. 227, (decided February 21, 1916) is called to our attention as in conflict with the previous opinion in the present case. We have been unable to see in what respect the cases conflict. There are no other contentions made which we deem it necessary to comment upon.

Upon the opinion previously rendered as supplemented by the present opinion the demurrer must be sustained.

By the Court: The demurrer to the amended complaint is sustained and judgment ordered dismissing the action on the merits without costs.

285 STATE OF WISCONSIN:

In Supreme Court, January Term, 1916.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
 vs.
 STATE OF WISCONSIN, Defendant.

The above entitled action having come on for hearing before said Court at the August 1915 term thereof and said Court having on December 7, 1915, ordered that the demurrer to the complaint be sustained and said complaint dismissed upon the merits; and thereafter said plaintiff having moved the Court for a rehearing and to vacate said order and to amend the same by striking therefrom the provision for the dismissal of the action on the merits and by granting leave to plaintiff to amend its complaint; and said Court having on January 11, 1916, granted the motion of said plaintiff to amend said order and for leave to file an amended complaint; and thereafter, pursuant to the leave thus granted, an amended complaint having been duly filed and served and said defendant having demurred thereto; and said action coming on for hearing before said Court at the January 1916 term thereof on said amended complaint and demurrer, Messrs. Olin, Butler, Stebbins & Stroud, (attorneys of record for the plaintiff in place of George H. Noyes, deceased) appearing as attorneys in behalf of said plaintiff, and W. C. Owen, Esq., Attorney General, and Walter Drew, Esq., Deputy Attorney General, appearing in behalf of said defendant; and said Court having on June 13, 1916, directed that the demurrer to the amended complaint be sustained and ordered judgment dismissing said action on the merits without costs:

Now, Therefore, on motion of said defendant;

It is ordered and Adjudged that the demurrer to said amended complaint be and the same is hereby sustained, and that this action be and the same is hereby dismissed on the merits without costs.

By the Court.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
 Clerk of Supreme Court.

287 [Endorsed:] State of Wisconsin. In Supreme Court. Northwestern Mutual Life Insurance Company, Plaintiff, vs. State of Wisconsin, Defendant. January Term, 1916. Judgment Dismissing Action. Copy.

288 (Endorsements:) State of Wisconsin. In Supreme Court. Northwestern Mutual Life Insurance Company, Plaintiff, vs. State of Wisconsin, Defendant. January Term, 1916. Judgment

dismissing action. Original. Filed June 13, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

289 STATE OF WISCONSIN:

In Supreme Court.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
VS.
STATE OF WISCONSIN, Defendant.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause except such papers as are omitted pursuant to the stipulation of the parties herein.

That the original writ of error, the petition therefor, the assignment of errors and prayer for reversal, the order allowing writ of error, the citation with its service endorsed thereon, certificate of lodgment and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 27th day of July, A. D. 1916.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wisconsin.

290 In the Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff
in Error,

VS.

THE STATE OF WISCONSIN, Defendant in Error.

It is hereby stipulated and agreed by and between the above named parties, through their respective attorneys, that in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed and no more, to-wit:

Assignment of errors and prayer. (Pages 9 to 11 of transcript.)

291 Opinion of Court sustaining demurrer to first complaint. (Pages 112 to 131 of transcript.)

Dissenting opinion of Timlin, J. (Pages 132 to 137 of transcript.)

Amended complaint, pages 1 to 50, inclusive, thereof, page 100 thereof and tables annexed to amended complaint, being pages 117 to 126 inclusive, of said amended complaint. (Pages 148 to 197 inclusive, page 247, and pages 264 to 273 inclusive, of transcript.)

Demurrer to amended complaint. (Page 276 of transcript.)

Opinion of Court sustaining demurrer to amended complaint.
(Pages 282 to 284 of transcript.)

Judgment dismissing action. (Pages 285 to 286 of transcript.)

Clerk's certificate to transcript. (Page 289 of transcript.)

Stipulation as to parts of record to be printed.

It is further stipulated and agreed that if from oversight or omission any necessary part of the record be not thus printed, that the plaintiff in error has the right to print or may be required by defendant in error to print any other or additional portions thereof.

Dated at Madison, Wisconsin, July 26th, 1916.

JOHN M. OLIN,

H. L. BUTLER,

RAY M. STROUD,

BYRON H. STEBBINS,

Attorneys for Plaintiff in Error;

W. C. OWEN,

Attorney General;

WALTER DREW,

Deputy Attorney General,

Attorneys for Defendant in Error.

[Endorsed:] In the Supreme Court of the United States. The Northwestern Mutual Life Insurance Company, Plaintiff in Error, vs. The State of Wisconsin, Defendant in Error. Stipulation as to printing transcript. (Original.) Filed Jul- 27, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

292 [Endorsed:] File No. —. Supreme Court U. S., October Term, 1916. Term No. —. The Northwestern Mutual Life Insurance Co., Plaintiff in Error, vs. The State of Wisconsin. Stipulation as to parts of record to be printed. Filed — —, 191—.

Endorsed on cover: File No. 25,435. Wisconsin Supreme Court. Term No. 605. The Northwestern Mutual Life Insurance Company, plaintiff in error, vs. The State of Wisconsin. Filed August 7, 1916. File No. 25,435.

POOR COPY



NO. 605

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JAMES D. MA

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1916

**THE NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,**

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

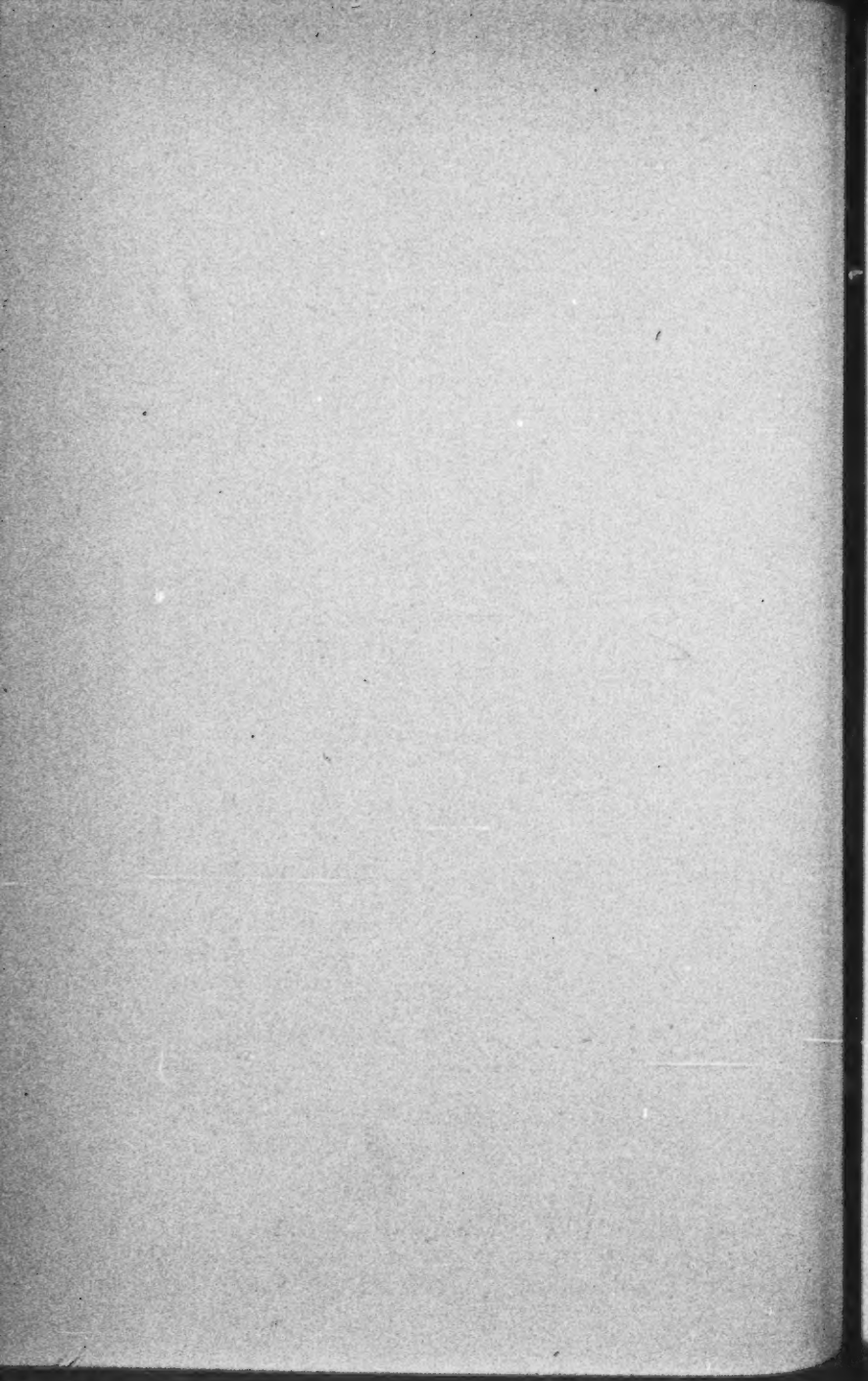
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN

Brief and Argument for Plaintiff in Error

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1916

NO. 605

THE NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN

STATEMENT OF THE CASE

This is a writ of error to review the final judgment of the supreme court of Wisconsin which sustained a demurrer to the plaintiff's amended complaint, and dismissed the action. (Tr. p. 53.)

The action was brought in the state supreme court, pursuant to Section 3200, Wis. Stats., to recover, as illegally exacted, license fees paid to the state under protest, amounting to \$482,193.23 paid in 1912, and \$505,643.22 paid in 1913. (Tr. p. 39.)

A general demurrer to the original complaint was sustained. (Opinion, pp. 2-12 of Tr.) Thereafter, pursuant to leave, the complaint was amended, a general demurrer again interposed, and sustained. (Opinion, pp. 51-53 of Tr.) Both opinions are reported in 163 Wis. 484.

The statute in question.

The license fees in question were collected under Sec. 1220, Wis. Stats. of 1911 (being Sec. 51.32 of later Stats.), which is set out in Appendix, p. 131; as are also at p. 132, Sec. 1221 (now Sec. 51.33), being the so-called retaliatory law, and at pp. 133-134, Sec. 1222, Subsec. 5 of Sec. 1947, and Sec. 1948, relating to the obtaining of a license and the payment of the license fees before transacting business within the state.

The statute in substance provides that:

"Every company * * * transacting the business of life insurance within this state" (excepting only such fraternal societies as have lodge organizations and insure only the lives of their own members) shall annually, on or before March 1, pay "in lieu of all taxes for any purpose authorized by the laws of this state" (except taxes on real estate), certain prescribed license fees "for transacting such business."

Classifications are made and varying fees applied thereto as follows:

	Domestic	Foreign
Level Premium companies.....	3% gross income (except rents of real estate and premiums collected outside state)	\$300 (subject to increase under Sec. 51.33 according as foreign state imposes higher tax on like Wisconsin companies)
Fraternal with lodge organizations.....	\$000.00	\$000.00
Other fraternal.....	300.00	300.00
*Stipulated premium companies.....	300.00	300.00
*Assessment companies.....	300.00	300.00

*No domestic companies of these classes and but one foreign transacting business in Wisconsin in 1912. To this plaintiff's argument as to discrimination between foreign and domestic level premium companies applies. The starred classes are not, therefore, further noticed.

Subsec. 4 of the statute provides:

"Such license, when granted, shall authorize the company * * * to transact business until the 1st of March of the ensuing year, unless sooner revoked or forfeited."

Grounds of decision by state court.

Upon the constitutional questions here presented for review, the majority of the state court (Mr. Justice Timlin dissenting) held:

(1) That it was unnecessary to determine whether the plaintiff's investment business was interstate commerce, because,

(2) The statute imposed no direct burden upon the investment business; this because,

(a) The payment of the fees was a condition upon the transaction of "life *insurance* business," and not upon the *investment* business,—plaintiff might, if it saw fit, discontinue the policy business in which event it could transact the investment business free from the tax.

(b) The 3% tax on *gross investment income* was to be taken as a mere measure of a tax on the *insurance* (as distinguished from investment) business; this chiefly on the authority of *Baltic Mining Co. v. Mass.*, 231 U. S. 68.

(3) The "very great" disparity of treatment, as between domestic and foreign level premium companies was justified by the difference in the location, for taxing purposes, of their reserves.

(4) The disparity as between domestic level premium companies and fraternal associations, both domestic and foreign, was justified by the asserted social and benevolent features of the latter, and by their lesser reserves and expense of administration.

The amended complaint.

The first cause of action counts on the taxes paid in 1912, based on 1911 income. The averments of the second cause of action are not printed. They are the same as the first, excepting as to dates and amounts, the difference not being material to the questions here involved. (Tr. p. 39.)

In the printing of the first count, the parts added by amendment are bracketed. The brackets are not material except as they identify the additional averments before the state court when its second opinion was written.

Some of the averments and detail contained in the amended complaint may be best referred to in connection with the argument. Its general and more important allegations may be summarized as follows:

Organization and chartered powers.

Plaintiff is a Wisconsin corporation, organized in 1857 as a mutual company, with authority to transact the life insurance business, expressly including the making of policy contracts, and the investment of its funds, both within and without the state.

Its business has become of great magnitude, extends into nearly all the states, and over 90% of it, in both its branches, is with residents of other states. (Tr. fols. 149-150.)

Commercial characteristics of policies.

"That said several policy contracts between said plaintiff and the residents of said states have been and are subject to sale, assignment and transfer, and to use as collateral security and other commercial purposes, and that the

same have been and are a common subject of sale, pledge, assignment and transfer as articles of commerce, and have been and are used extensively as collateral security and for other financial and commercial uses, and are valuable for each and all of said purposes and for other general purposes of trade and commerce, and many of them are applied for and issued for the sole purpose of protecting and increasing the value of the rights and property of individuals and corporations engaged in financial and commercial transactions." (Tr. fols. 151-152.)

Policy part of business, how conducted.

Plaintiff employs some five thousand agents and sub-agents (of which only 480 are in Wisconsin) who solicit applications for insurance in the localities where they reside, the agents being employed under contract made direct with the home office and the sub-agents being employed by the agents under written contract subject to the approval of the home office. The agents are authorized to collect the first premium and to deliver policies, on applications taken by them or their agents, provided the applications shall have been approved and the policies forwarded by the home office. There are employed in addition (and also in addition to many inspection agencies) some twelve thousand medical examiners under written contract made with and whose services are paid directly by the home office, and whose duties are to make physical examinations and reports. (Tr. fols. 152-154.)

Contracts of insurance are effected substantially as follows:

The agent takes an application upon a form transmitted from the home office, the result of the medical examination is embraced on a form likewise

transmitted, the application and report are transmitted to the home office, and if approved, a policy is sent to the agent for delivery and collection of first premium,—these communications being by mail. The agents make and transmit to the home office on blanks furnished by it, monthly reports and remittances of premiums. Losses are payable at the home office on receipt and approval of proofs of death, for which blanks are transmitted by the home office to applicants, and then returned to the home office. Premiums are payable in advance at the home office, or to the agents on delivery of receipts signed by its proper officers, notice being transmitted from the home office to the policyholder, either directly or through the agent; in case of non-payment a second and third notice follows. (Tr. fols. 156–158.)

None of its agents or representatives are authorized to accept risks of any kind or to make, modify or discharge contracts. (Tr. fol. 155.)

In all of these transactions, including the making of contracts with agents and representatives, forwarding of blanks, and of applications, reports, policies, notices of maturity of premiums, premiums, proofs of death, payment of losses, and others enumerated in the complaint, the usual medium of communication by mail or express is employed. (Tr. fols. 156–163.)

The extent of this interstate intercourse is indicated by the averment that during the year 1911 upwards of 17,000 packages of supplies were transmitted by mail, express and freight, and during the same year about 2,500 separate pieces of mail were posted daily from the home office, mostly to non-residents, and about 1,800 separate pieces of mail

were received daily from non-residents alone; this in addition to a large number each day of telegraphic and telephonic communications with non-residents. (Tr. fols. 155, 156.)

Investment part of business, how conducted.

Mortgage loans.

Plaintiff employs, at stated salaries transmitted from the home office, special loan agents residing and maintaining places of business in nineteen or more states. These agents solicit loans; furnish forms of application prepared at and sent to them from the home office; examine the offered security; transmit the applications and their reports thereon to the home office; procure and send to the home office for examination abstracts of title, and receive from the home office its report thereon; receive from the home office the note and mortgage which are there prepared, and attend to its proper execution and return to the home office; receive for delivery to the borrower the check or draft from the home office to cover the amount of the loan, and transmit the completed and recorded security to the home office.

Upon the receipt of an application by the home office, the same, together with the report of the loan agent and other correspondence upon the subject, are examined, and the amount, terms and conditions of the loan are determined, and information with respect to the action of the company is transmitted by mail or otherwise, together with written instruction to the applicant,—the loan agents being thus without authority to accept applications or to consummate loans. Abstracts of title, and extensions thereof, furnished by the applicant, are exam-

ined by and subject to the approval of the home office. If found satisfactory, the note and mortgage are prepared at the home office, sent by mail or express to the applicant for execution, after which they are returned to the home office for its approval. Before delivery of the check or draft in consummation of the loan, the mortgage is filed for record, and the abstract continued. The papers are then returned by mail or express to and retained by the company at its home office until the loan is paid and released. The principal and semi-annual interest are payable at and are transmitted to the home office by the applicant, and on full payment the papers, with proper release, are transmitted to him.

In addition to the interstate transmission, which is by mail or express, of these various securities, checks, drafts, documents, etc., there is much of interstate communication and transmission with respect to extensions of loans, partial releases, obtaining and renewal of fire policies, payments of and receipts for taxes, etc. (Tr. fols. 164-167.)

Bonds.

To meet the demands of its policyholders for the reserve creditable to their policies, it is necessary that plaintiff have on hand at all times a very considerable amount of readily convertible securities. This, as well as the necessity of keeping its funds invested, requires the making of bond investments. (Tr. fols. 169.)

Purchases are accordingly made of municipal and railroad mortgage bonds through parties residing and having their places of business in other states, the negotiations being largely by mail, and the bonds being transmitted from other states by mail or ex-

press, and payment therefor being likewise transmitted to other states. Coupons and semi-annual interest payments are similarly transmitted. The bonds are chiefly purchased in the open market, and, in the conduct of its business, plaintiff may be from time to time required to sell in open market bonds in which it has thus invested. (Tr. fol. 168.)

Policy loans.

Plaintiff's policies provide for advances to the policyholder (up to cash surrender value) on the pledge and security of his policy. This is carried out by the transmission by the policyholder of an application, transmission to him, if the application is accepted by the home office, of an assignment of the policy, execution thereof by the policyholder and its transmission by him, with the policy, to the home office, and by the latter to the policyholder of check or draft for the amount of the loan. These transactions are carried on through the mails. (Tr. fols. 159, 160.)

Extent of interstate investment business and cost of carrying it on.

The extensive and continuous character of the interstate intercourse in the conducting of plaintiff's investment business is indicated by the following figures for 1911 (1912 being much the same). (Tr. pp. 21, 25-27, 41):

Security	Am't. acquired during year	Int. collected during year	Total amount outstanding at end of year
Mortgage loans.....	\$23,328,696	\$7,446,393	\$153,562,654
Bonds.....	7,155,000	3,233,499	76,185,385
Policy loans.....		2,133,152	41,988,863

About 95% of this business was with non-residents of Wisconsin, and involved interstate intercourse. (Tr. fol. 171.)

The expenses incurred during 1911 in the conduct of the investment business was over \$750,000, of which more than 95% was incurred in carrying on that part of it transacted with residents of other states. (Tr. fol. 170.)

The carrying on of the investment business vital to the policy business.

The plaintiff does business upon the level premium plan, by which premiums and amount of indemnity are both fixed by the contract, and not subject to change except by the mutual consent of the parties. An essential factor in the fixing of premiums is, therefore, the amount which will accrue, during the probable lives of its contracts, from the investment and reinvestment of the premiums collected.—“without the ability to freely invest its funds upon advantageous rates and terms the conducting of a life insurance business by plaintiff would be wholly impossible.” Throughout its existence, plaintiff has availed itself of its chartered right to thus invest its funds within any of the states. Its contracts for the payment of benefits or death losses, aggregating, on December 31, 1911, over a billion dollars, have been made upon the faith of such chartered right. Numerous statutes of the state (later referred to) have not only recognized the right, but, in common with the laws of other states, have imposed “the obligation to maintain a reserve for the meeting of its contracts, which reserve can only be maintained by the investing of its funds as aforesaid.” (Tr. fols. 177-179.)

Foreign level premium companies and fraternal, domestic and foreign, transact business in Wisconsin of the like character and (except as to taxation) are subject to like state supervision and regulation.

There are other companies, both foreign and domestic, transacting business in Wisconsin on the like level premium plan, some of them, conspicuously the New York Life Insurance Company, being mutual companies of precisely the same character as plaintiff. All of these companies, both foreign and domestic, "transact a life insurance business of the same kind and character as the plaintiff, and, except as to taxation, are, by the laws of Wisconsin, subject to like state regulation and supervision." (Tr. fols. 179, 181.)

There are a large number of incorporated fraternal associations transacting business in Wisconsin, having lodge organizations, and insuring the lives of their own members, some of which were organized under the laws of other states; and that the bulk of the domestic fraternal insurance business is transacted by a small number of associations, as is also the bulk of the business transacted by the foreign associations. (Tr. fols. 181, 182.)

"That the essential and predominant feature of all the insurance companies and associations hereinbefore referred to is the same, being the payment of a definite sum to a designated party or beneficiary on the death of the person whose life is insured; that the presence or absence of social, charitable, benevolent or lodge features in the organization, or the particular plan or method of organization, or the place of organization of the corporation, or association, whether under the laws of the state of Wisconsin, or under the laws of any other state, is not a dis-

tinguishing feature in the life insurance business, nor does any such or similar distinction form a basis for a classification of such companies so as to justify a discrimination in the standard and method of taxation to be imposed upon them." (Tr. fols. 183-184).

Discriminatory results of operation of statute.

Averments are made and Tables appended showing the results of the statute as applied (1) to plaintiff, (2) to all other domestic level premium companies, (3) to all foreign level premium companies, and (4) to the New York Life, a like mutual company having the largest Wisconsin business of all foreign level premium companies. (Tr. fols. 180, 181; Table II, p. 12.)

Also Tables showing scope of insurance business of fraternal associations, foreign and domestic, doing business in Wisconsin, and extent to which the fraternal insurance field is dominated by a comparatively few companies. (Tr. fols. 182, 183; Tables IV and VI, pp. 44, 46.)

Some of the more conspicuous of these results are condensed below (1911 business being taken, results for 1912 being much the same):

Results as between plaintiff and other level premium companies.

Year 1911	Plaintiff	New York Life	All foreign level premium companies
Wisconsin policies issued	\$10,923,240	\$3,164,991	\$26,998,392
Wisconsin premiums	2,836,488	1,119,410	4,327,557
Wisconsin license fees	482,193	10,283	27,095
Per cent of Wisconsin license fees to Wisconsin premiums....	17%	0.9%	0.6%

Results as between plaintiff and fraternal associations.

Year 1911	Plaintiff	All domestic fraternals	All fraternals combined
Wisconsin insurance written.....	\$10,923,240	\$9,880,337	\$34,010,258
Wisconsin license fees	482,193	000,000	000,000

Averments showing plaintiff the particular subject of unique and oppressive taxing scheme.

No other state imposes a tax on gross investment income. (Tr. fol. 189.)

Domestic level premium companies are the only insurance companies of any kind whatsoever, life, fire, or otherwise (with exceptions in favor of certain domestic mutuals), as to which Wisconsin applies an unequal rate of taxation as between those organized within and those organized without the state. (Tr. fol. 185.)

Other corporations formerly subject to license fee taxation, such as railroads, sleeping car companies, and telephone companies were taxed upon the basis of Wisconsin receipts only, and without distinction between those organized within and those organized without the state. (Tr. fols. 185, 186.)

Fire, navigation, casualty, suretyship and title guaranty companies are taxed upon the basis of substantially 2% of receipts from Wisconsin business only, while plaintiff paid about 17% of its Wisconsin premiums. (Tr. fol. 186.)

The fees exacted from plaintiff for the privilege of transacting business in 1911 was nearly twice as great as the combined license fee paid for the like privilege by all other life insurance companies and

associations, of whatever kind, and by all surety and accident, assessment accident, fire marine, hail, and cyclone, and all other companies transacting the insurance business in the state of every kind whatsoever. (Tr. fol. 186; Table IX.)

There follow averments (inserted by amendment because of the contrary assumption in the first opinion of the court below) calculated to show that the tax exacted from plaintiff is grossly disproportionate to that which would have resulted had personal property or income taxation been applied to plaintiff, with the deductions for liabilities, losses and expenses indicated by state policy. (Tr. fols. 187-190.)

Disapproval of tax by State Tax Commission.

There follow averments showing that as early as 1901, the Tax Commission of Wisconsin (a body created in 1897, with the duty, among others, to formulate and recommend legislation relating to taxation), announced its disapproval of the principle of the statute and has twice recommended to the legislature the adoption of legislation which would have tended to remove the discriminatory and oppressive features of the law, and under which plaintiff's taxes would not have exceeded one-quarter the amount exacted under the present statute. (Tr. fols. 191, 192.)

Plaintiff denied privilege of transacting any business except on condition of payment of the 3% of gross income.

It is alleged that the commissioner of insurance and state treasurer demanded the payment of the 3% of Wisconsin premiums and gross investment income, and notified plaintiff that in case of default in pay-

ment license to transact business after March 1, 1912, would be withheld, and plaintiff would not be permitted thereafter "to transact any business in the state;" whereupon the taxes in question were paid under protest. (Tr. fol. 194.)

SPECIFICATION OF ERRORS

The court erred:

1. In holding that, as applied to plaintiff, the statute does not unlawfully obstruct or burden commerce among the states in contravention of Sec. 8, Art. I, Federal Constitution. (Tr. fol. 10.)

(a) It makes the obtaining of a license and the payment of the license fee conditions upon the privilege of transacting plaintiff's interstate commerce business.

(b) The tax is laid, without restriction, on gross income from plaintiff's interstate commerce investment business.

2. In holding that the statute does not deny the equal protection of the laws guaranteed by Sec. 1, Fourteenth Amendment. (Tr. fol. 10.)

(a) It arbitrarily discriminates between domestic and foreign level premium companies.

(b) It arbitrarily discriminates between domestic level premium companies and fraternal companies and fraternal associations, both domestic and foreign.

3. In holding that the statute is not repugnant to Section 1 of the Fourteenth Amendment. (Tr. fol. 9.)

It imposes an arbitrary, discriminatory and confiscatory burden upon plaintiff.

SUMMARY OF POINTS

I

PLAINTIFF'S BUSINESS, PARTICULARLY THE INVESTMENT BRANCH OF IT, CONSTITUTES INTERSTATE COMMERCE.

- 1. The principle of the Textbook and Lottery cases, rather than of the New York Life case, applies to plaintiff's investment business. (p. 34.)**

International Textbook Co. v. Pigg, 217 U. S. 91.

International Textbook Co. v. Peterson, 218 U. S. 664.

Lottery Case, 188 U. S. 321.

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495.

Buck Stove Co. v. Vickers, 226 U. S. 205.

- (a) **Not a ground of distinction that the securities are acquired primarily for investment rather than for resale. (p. 37.)**

Weber v. Freed, 224 Fed. 355, 358. (C. C. A.)

Same Case, affirmed, 239 U. S. 325, 329.

White Slave Cases, 227 U. S. 308, 323; *id.* 326.

- (b) **Not a ground of distinction as to the mortgage loans that they are not acquired in the open market, but rather from the maker of them. (p. 38.)**

Robbins v. Shelby Taxing District, 120 U. S. 489, 494-497.

Caldwell v. North Carolina, 187 U. S. 622, 631, 632.

Crenshaw v. Arkansas, 227 U. S. 389.

Davis v. Virginia, 236 U. S. 697.

Rosenberger v. Pacific Exp. Co., 241 U. S. 48.

Stickney Co. v. Lynch, 163 Wis. 353.

- (c) **The suggested grounds for distinguishing the mortgage loan business are even less applicable to the extensive and essential bond and policy loan part of plaintiff's investment business.** (p. 39.)

- (1) **Bond business:** (p. 39.)

Trans., p. 41; fol. 169.

Cases cited under (a), *supra*.

- (2) **Policy loan business:** (p. 40.)

Trans., fols. 159, 162, 171.

Grigsby v. Russell, 222 U. S. 149, 156.

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495.

New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 597.

Cohen v. Samuels, 245 U. S. 50.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17.

Cole Motor Car Co. v. Hurst, 228 Fed. 280, 283.

Weber v. Freed, 239 U. S. 325, 329.

- (d) **The grounds on which the Textbook cases have been distinguished in later cases emphasize their application in this case.** (p. 42.)

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 510, 511.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394, 398.

- (e) In numerous cases in which the question has been directly presented, the dealing in securities has been placed within the doctrine of the Textbook and Lottery cases and not within the doctrine of *Paul v. Virginia*. (p. 45.)

Alabama, etc., Trans. Co. v. Doyle, 210 Fed. 173, 183.

Compton Co. v. Allen, 216 Fed. 537.

Bracy v. Darst, 218 Fed. 482, 495.

Halsey v. Merrick, 228 Fed. 805, 806.

Sioux Falls Co. v. Stockwell, 230 Fed. 236, note.

Geiger-Jones Co. v. Turner, 230 Fed. 233, 239.

Blue Sky Cases, 242 U. S. 529; *id.* 559; *id.* 568.

- (f) Cases relied upon by the state distinguished. (p. 46.)

Nathan v. Louisiana, 8 How. 73.

Williams v. Fears, 179 U. S. 270.

Ware v. Mobile Co., 209 U. S. 405.

Engel v. O'Malley, 219 U. S. 128.

Trading Stamp Cases, 240 U. S. 391.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394, 398.

2. Plaintiff's investment transactions are a necessary part, and not an incidental consequence, of its business, and are essentially interstate. (p. 47.)

- (a) The investment transactions are essential to the business. (p. 47.)

Trans., fols. 149, 150; 162; 167-171; 177-179.
Sec. 1951, Wis. Stats.

The Daniel Ball, 10 Wall. 557, 566.

Norfolk, etc., Co. v. Penn., 136 U. S. 114, 119, 126.

- (b) That the mortgage loan transactions are largely conducted through special loan agencies does not change their interstate character. (p. 49.)

Trans., fols. 163-170.

Textbook Cases, 217 U. S. 91; *id.* 218 U. S. 664.

And cases cited under 1 (b), *supra*.

3. As to whether the policy part of plaintiff's business constitutes interstate commerce.
(p. 51.)

- (a) The doctrine of the policy cases should not be extended further. (p. 51.)
- (b) The proposition on which the policy cases rests, namely, that contracts of insurance are not commerce at all, involves a limitation upon what may be the legitimate subjects of commerce, which is exceptional, and out of harmony with the general trend of authority. (p. 53.)

Trans., fol. 152.

Hoke v. U. S., 227 U. S. 308, 320.

Rosenberger v. Pacific Express Co., 241 U. S. 48, 52.

Davis v. Virginia, 236 U. S. 697, 698.

McCall v. California, 136 U. S. 104, 108.

Lottery Cases, 188 U. S. 321, 371.

Textbook Cases, 217 U. S. 91, 106.

International Textbook Co. v. Gillespie, 129 S. W. 922.

Peterson v. Hofteiser, 150 N. W. 934.

Weber v. Freed, 224 Fed. 355, 358; 239 U. S. 325.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17.

- Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 283.
U. S. v. U. S. Machinery Co., 234 Fed. 127, 143.
Marienilli v. United Booking Offices, 227 Fed. 165, 167.
Kansas City, etc., v. Seaman, 160 Pac. 1139. (Kan.)
Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 9, 12.
Tel. Co. v. Texas, 105 U. S. 460.
W. Union v. Pendleton, 122 U. S. 347, 356.
Richmond v. Tel. Co., 174 U. S. 761.
Passenger Cases, 7 How. 283.
Covington Bridge Co. v. Kentucky, 154 U. S. 204, 218.
White Slave Cases, 227 U. S. 308, 326.

(c) **Recent legislation suggestive of importance of Federal power of regulation of insurance business in both its branches.** (p. 57.)

- (1) **War risk insurance of vessels and cargoes:** (p. 57.)
 Act of Sept. 2, 1914; Fed. Stats. Ann., 1916 Supp., p. 283.
- (2) **Convertible term insurance of soldiers and seamen:** (p. 58.)
 Act of Oct. 6, 1917; Fed. Stats. Ann., Supp. Oct. 1917, p. 151.
- (3) **Federal Reserve and Farm Loan Banks:** (p. 59.)
 Act of Dec. 23, 1913; Fed. Stats. Ann., Supp. 1914, p. 260.
 Act of July 17, 1916; Fed. Stats. Ann., Supp. Oct. 1916, p. 3.
McCulloch v. Maryland, 4 Wheat. 314.
- (4) **State Retaliatory Laws:** (p. 60.)
Trans., pp. 28, 29,

Sec. 51.33, Wis. Stats.

1 Story, The Constitution, Sec. 249.

1 Farrand, Records of Fed. Convention, 275.

II

THE STATUTE NECESSARILY OPERATES AS A DIRECT BURDEN ON PLAINTIFF'S INTERSTATE COMMERCE BUSINESS.

1. In determining whether the statute directly burdens commerce, the controlling test is its practical operation and effect, as to which the views of the state court are not conclusive on this court. (p. 62.)

Galveston, etc., R. R. Co. v. Texas, 210 U. S. 217, 227.

U. S. Express Co. v. Minnesota, 223 U. S. 335, 346.

St. Louis S. W. R. Co. v. Ark., 235 U. S. 350, 362.

Kansas City R. Co. v. Kansas, 240 U. S. 227, 231.

Crew Levick Co. v. Penn., U. S. Adv. Ops. (1917), No. 3, p. 123.

2. The view of the state court that the payment of the license fees was only a condition upon the transacting of the life insurance business, as distinguished from the investment part of it, and hence imposed no burden on the latter, ignores the substance and necessary effect of the statute. (p. 63.)

Trans., fols. 177, 178, 194.

Secs. 1220, 1222, 1947—5, 1948, 1951, 1952 and 1954, Wis. Stats.

- Crutcher v. Kentucky*, 141 U. S. 47, 56.
Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 227.
Ludwig v. Western Union Tel. Co., 216 U. S. 146, 160.
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30.
International Textbook Co. v. Pigg, 217 U. S. 91.
Oklahoma v. Wells-Fargo Co., 223 U. S. 298.

3. **Because the statute, in substance and effect, operates to impose as conditions upon the right of plaintiff to transact the investment, as well as the policy part of the business, the obtaining of a license and the payment of the fees, the statute imposes a direct and unlawful burden on interstate commerce.** (p. 67.)

- Crutcher v. Kentucky*, 141 U. S. 47, 58.
Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695.
International Textbook Co. v. Pigg, 217 U. S. 91, 108, 111, 113.
St. Louis O. S. Ry. Co. v. Arkansas, 235 U. S. 350, 364, 368.
Looney v. Crane Co., Adv. Ops. (1917), No. 3, p. 144.
W. U. Tel. Co. v. Kansas, 216 U. S. 1, 30.
Ludwig v. W. U. Tel. Co., 216 U. S. 146, 160.

4. **Because the statute, as construed by the court and as applied to plaintiff, lays the tax on gross earnings, including those derived from interstate business, it directly and unlawfully burdens commerce.** (p. 68.)
Trans., fols. 134, 135, 127.

- (a) **An unrestricted gross earnings tax is a direct burden on commerce.** (p. 68.)

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 224.

Oklahoma v. Wells-Fargo & Co., 223 U. S. 298, 301.

St. Louis Ry. Co. v. Arkansas, 235 U. S. 350, 363.

Kansas City Ry. Co. v. Kansas, 240 U. S. 227.

Crew Levick Co. v. Penn., Adv. Ops. (1917), No. 3, pp. 122, 124.

Looney v. Crane Co., *supra*.

W. U. Tel. Co. v. Kansas, 216 U. S. 1, 36, 48.

Pullman Co. v. Kansas, 216 U. S. 56.

Ludwig v. Western Union Tel. Co., 216 U. S. 146.

Atchison, etc., Ry. Co. v. O'Connor, 223 U. S. 280, 285.

Choctaw & Gulf R. R. Co. v. Harris, 235 U. S. 292, 298, 299.

Philadelphia Steamboat Co. v. Penn., 122 U. S. 326.

Harman v. Chicago, 147 U. S. 396.

Fargo v. Hart, 193 U. S. 490.

Sault Ste. Marie v. International Co., 234 U. S. 333, 341.

Minnesota Rate Cases, 230 U. S. 352, 400.

Freight Tax Case, 15 Wall. 232, 277.

- (b) **The application of foregoing principle to the facts here presented.** (p. 70.)

Trans., fol. 192; p. 171; p. 41; fols. 186, 190; 170.

First nine cases cited under (a), *supra*, and

Baltic M. Co. v. Mass., 231 U. S. 68, 87.

U. S. Glue Co. v. Town of Oak Creek, 161 Wis. 211.

Southern Ry. Co. v. Greene, 216 U. S. 400, 404.

5. The cases on which the state court rested its decision, have no application. (p. 75.)

Maine v. G. T. Ry. Co., 142 U. S. 217.

Flint v. Stone Tracy Co., 220 U. S. 107.

Baltic Mining Co. v. Mass., 231 U. S. 68.

These and other cases distinguished by:

St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350.

Kansas City R. Co. v. Kansas, 240 U. S. 227.

Crew Levick Co. v. Penn., *supra*.

Looney v. Crane Co., *supra*.

6. It is not material whether the state could impose an equivalent burden by some other form of tax. (p. 76.)

Home Savings Bank v. Des Moines, 205 U. S. 503, 520.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664.

Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302.

7. Nor is it material that plaintiff's domestic investment income (comparatively slight) is taxed at the same rate as its interstate income. (p. 77.)

Robbins v. Shelby Taxing District, 120 U. S. 489, 497.

Minnesota v. Barber, 136 U. S. 313, 326.

Brennan v. Titusville, 153 U. S. 289.

III

THE STATUTE DENIES EQUAL PROTECTION IN THAT IT ARBITRARILY DISCRIMINATES AGAINST DOMESTIC AND IN FAVOR OF FOREIGN COMPANIES.

- 1. The statute imposes a privilege or occupation tax, which is within the protection of the Fourteenth Amendment. (p. 78.)**

State v. Railway Co., 128 Wis. 449, 497.

Nunnemacher v. State, 129 Wis. 190, 218, 219, 220.

Beals v. State, 139 Wis. 544, 556, 557.

Black v. State, 113 Wis. 205, 218, 219.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112.

- 2. The equality clause is applicable to domestic corporations, and precludes arbitrary classification. (p. 78.)**

- (a) Equality clause applicable to corporations, both domestic and foreign. (p. 78.)**

Trans., fol. 116.

Santa Clara County v. Southern Pacific Railroad, 118 U. S. 394.

Cotting v. Kansas City Stockyards Co., 183 U. S. 79.

Southern Railway Co. v. Greene, 216 U. S. 400.

Ex parte Schollenberger, 96 U. S. 369.

- (b) The state may no more discriminate against its own corporations than against those of another state. (p. 79.)**

Trans., fol. 116.

Yick Wo v. Hopkins, 118 U. S. 356, 369.

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State v. Hoyt, 71 Vt. 59; 42 Atl. 973, 975.
State v. Cadigan, 73 Vt. 245; 50 Atl. 1079, 1081.
State v. Hinman, 65 N. H. 103; 18 Atl. 195.
State v. Pennoyer, 65 N. H. 113; 18 Atl. 878.
Bliss' Petition, 63 N. H. 135.
State v. Doran, 28 S. D. 486; 134 N. W. 53.
Wiley v. Palmer, 14 Ala. 627.
Oliver v. Washington Mills, 11 Allen, 268.
In re Stanford's Estate, 54 Pac. 259; 58 Pac. 462 (Cal.).
McGuire v. Parker, 32 La. Ann. 832.
Ward v. Maryland, 12 Wall. 418.
Blake v. McClung, 172 U. S. 239, 258; 176 U. S. 59.
1 Cooley, Taxation (3rd Ed.), 168, 169.
Cooley, Const. Lim. (6th Ed.), 597.

(c) To justify the difference in treatment there must be real differences which bear a just and proper relation to attempted classification. (p. 79.)

Connolly v. U. S. P. Co., 184 U. S. 540, 559.
Gulf Ry. Co. v. Ellis, 165 U. S. 150, 165.
Southern Ry. Co. v. Greene, 216 U. S. 400, 416-418.
Black v. State, 113 Wis. 205, 219.

3. There is no difference between the domestic and foreign company as regards the purpose or object of the statute, the nature or extent of the privilege for which the fee is exacted, nor in the burdens of state supervision or regulation which the business imposes. (p. 80.)

Trans., fols. 179, 184.

Sec. 1220; Subsec. 1, Sec. 1915; Subsec 2, Sec. 1916; Sec. 1950; Subsec. 1, Sec. 1953m and Sec. 1954, Wis. Stats.

Travelers Ins. Co. v. Fricke, 94 Wis. 258, 264.

Travelers Ins. Co. v. Fricke, 99 Wis. 367, 370, 374.

State ex rel. F. & C. Co. v. Fricke, 102 Wis. 107, 112.

C. & N. W. Ry. Co. v. State, 128 Wis. 553, 589.

4. The fact that one class is domestic and the other foreign does not justify the difference in treatment. (p. 82.)

- (a) **Being "persons" within the Fourteenth Amendment, difference in place of organization or source of powers or privileges does not justify difference in treatment. (p. 83.)**

Southern Ry. Co. v. Greene, 216 U. S. 400, 416-418.

Kansas City, etc., Co. v. Stiles, 242 U. S. 111.

Flint v. Stone Tracy Co., 220 U. S. 107, 161.

Herndon v. Chi. R. I. & P. Ry. Co., 218 U. S. 135, 158.

Baltic Mining Co. v. Mass., 231 U. S. 68, 87.

Bell's Gap R. Co. v. Penn., 134 U. S. 232, 237.

- (b) **That Wisconsin has in substance domesticated foreign corporations gives added sanction to the proposition that difference in place of organization is not a justifying distinction. (p. 87.)**

Subsecs. 1 and 10, Sec. 1770b, Wis. Stats.

State ex rel. Wis. Trust Co. v. Leuch, 156 Wis. 121, 130.

Barry v. Minahan, 127 Wis. 570, 575.

Thronson v. Universal Mfg. Co., 164 Wis. 44, 49.

Santa Clara Female Academy v. Sullivan, 6 N. E. 183, 186. (Ill.)

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 557, 558.

American Smelting Co. v. Colorado, 204 U. S. 103, 113.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 344.

C. R. I. Ry. Co. v. Ludwig, 156 Fed. 152, 158-160.

Ivy v. W. U. Tel. Co., 165 Fed. 371, 377-378.

5. The difference in the location of reserves for taxing purposes does not justify the difference in treatment. (p. 88.)

Sec. 1, Art. VIII, Wis. Const.

Home Savings Bank v. Des Moines, 205 U. S. 503, 519.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664.

Louisville, etc., R. Co. v. Greene, 244 U. S. 522, 553, 554.

Southern Ry. Co. v. Greene, 216 U. S. 400, 417.

Gulf Ry. Co. v. Ellis, 165 U. S. 150, 154.

6. The retaliatory statute does not justify the classification, or materially modify the discrimination. (p. 94.)

Sec. 1221 (now 51.33), Wis. Stats.

(a) As to validity of retaliatory tax laws. (p. 94.)

Home Ins. Co. v. Swigert, 104 Ill. 653.

Phoenix Ins. Co. v. Welch, 29 Kan. 480.

People v. Fire Ass'n, 92 N. Y. 311.

Philadelphia Fire Ass'n v. New York, 119

U. S. 110, 117, 119.

Ins. Co. v. Morse Co., 20 Wall. 445, 455, 456.

Southern Ry. Co. v. Greene, 216 U. S. 400, 415.

- (b) The retaliatory provisions do not operate to correct or warrant the discrimination. (p. 95.)

Trans., pp. 42, 43; fol. 191.

Kidd v. Alabama, 188 U. S. 730, 732.

- (c) Nor do the retaliatory laws of other states justify discrimination by Wisconsin. (p. 98.)

Black v. State, 113 Wis. 205, 221.

7. The law makes plaintiff the subject of a taxing scheme unique in legislative history, and arbitrarily imposing burdens grossly disproportionate to those which would result from any other recognized system of taxation. (p. 100.)

- (a) History of the statute in question. (p. 100.)

- (b) Condemnation of tax by State Tax Commission. (p. 103.)

Trans., fols. 189-192.

- (c) The statute is unique in insurance taxation, and manifests arbitrary selection. (p. 103.)

Trans., fols. 189; 185, 186.

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92.

- (d) The statute imposes tax burdens wholly disproportionate to those which would have resulted from any recognized system of taxation. (p. 105.)

- (1) Personal property taxation: (p. 106.)

Trans., fols. 283; 187-188; 169; p. 42.

Sec. 1, Art. VIII, State Const.

Sec. 1036; Subsec. 10, Sec. 1038; Sec. 1948;
Subsec. 1, Sec. 1950; Sec. 1952, Wis. Stats.;
Chap. 378 laws 1903.

Bankers' Life Ins. Co. v. Howland, 73 Vt. 1;
57 L. R. A. 374, 375.

New Haven Trust Co. v. Gaffney, 47 Atl. 760,
761.

Mutual Benefit Life Ins. Co. v. Herold, 198 Fed.
199, 213, 214; 201 Fed. 918; 231 U. S. 755.

Insurance Company of North America v.
McCoach, 218 Fed. 905, 907.

Uhlman v. New York Life Co., 109 N. Y. 421,
431.

Timlin v. Equitable Life Co., 141 Wis. 276, 284.
C. & N. W. Ry. Co. v. State, 128 Wis. 553, 603,
604.

Black v. State, 113 Wis. 205, 221.

Lawrence University v. Outagamie County, 150
Wis. 244, 249.

State ex rel. Owen v. Donald, 161 Wis. 188.

Ruggles v. Fond du Lac, 53 Wis. 436.

People v. Weaver, 100 U. S. 539.

Pelton v. National Bank, 101 U. S. 143, 153.

Evansville Nat. Bank v. Britton, 8 Fed. 867.

Liverpool, etc., Ins. Co. v. Orleans Assessors,
221 U. S. 346, 354, 355.

Metropolitan Life Ins. Co. v. City of New
Orleans, 205 U. S. 395.

Savings, etc., Co. v. Multnomah, 169 U. S. 421.

State ex rel. Manitowoc v. Tax Commission, 161
Wis. 111, 116.

(2) **Income taxation:** (p. 113.)

Trans., fol. 189.

Subsecs. 1, 2, 3, 6, Sec. 1087m, Wis. Stats.

Mutual Benefit Life Ins. Co. v. Herold, 198 U. S. 199; 201 Fed. 918; 231 U. S. 755.

Conn. General Life Ins. Co. v. Eaton, 218 Fed. 188.

Conn. General Life Ins. Co. v. Eaton, 218 Fed. 206, 222; 223 Fed. 1022.

State ex rel. Bundy v. Nygaard, 163 Wis. 307. *Income Tax Cases*, 148 Wis. 456, 513.

State ex rel. Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116.

U. S. Glue Co. v. Oak Creek, 161 Wis. 211, 221.

State ex rel. Arpin v. Eberhardt, 158 Wis. 20.

(3) Summary as to the assumed equivalency of result under other forms of taxation. (p. 117.)

8. The cases on which the state court sanctioned the classification and other cases relied on by state below. (p. 118.)

Pacific Express Co. v. Seibert, 142 U. S. 339.

Kidd v. Alabama, 188 U. S. 730.

Brown-Forman Co. v. Kentucky, 217 U. S. 563.

Field v. Barber Asphalt Co., 194 U. S. 618.

District of Columbia v. Brook, 214 U. S. 138, 152.

Travelers Ins. Co. v. Conn., 185 U. S. 364, 369.

Flint v. Stone Tracy Co., 220 U. S. 108, 161, 162.

Income Tax Cases, 148 Wis. 546.

IV

THE STATUTE DENIES EQUAL PROTECTION IN THAT IT ARBITRARILY DISCRIMINATES BETWEEN PLAINTIFF AND FRATERNAL SOCIETIES.

1. Both are purely mutual associations. (p. 120.)

Mutual Benefit v. Herold, 198 Fed. 199; 201 Fed. 918.

Connecticut General v. Eaton, 218 Fed. 188; 223 Fed. 1022.

N. W. Mut. Life Ins. Co. v. Fink, Eastern District of Wisconsin, not yet reported.
Commonwealth v. Penn. Mutual L. I. Co., 97 Atl. 677.
Commonwealth v. Metropolitan, 98 Atl. 1072.
Mutual Benefit v. Commonwealth, 107 S. W. 802.
New York Life v. Chaves, 153 Pac. 303.

2. The lodge or social side of fraternal insurance does not justify difference in treatment. (p. 122.)

Trans., fols. 121, 182-184; pp. 44, 46.
Borgnis v. Falk Co., 147 Wis. 327, 356.
State v. Evans, 130 Wis. 381.
State v. Miller, 66 Iowa, 26; 23 N. W. 241, 244.
Bruce v. Connecticut Mut. Co., 74 Minn. 310; 77 N. W. 210.
Morse v. Modern Woodmen, 164 N. W. 829 (Wis.)
Alden v. Maccabees, 178 N. Y. 535.
Kemp v. Good Templars, 19 N. Y. S. 435.
State v. Arlington, 157 N. C. 640; 73 S. E. 122.
 1 Bacon, Ben. Soc., Secs. 52, 146.
 2 Bacon, Ben. Soc., Sec. 350,

3. Difference in reserve maintained, or expense of administration, does not warrant classification. (p. 127.)

Trans., fols. 121, 179, 184; pp. 42, 46.

4. Case cited by the state court as sustaining the classification. (p. 129.)

German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

5. The exemption of fraternal associations not aided by the retaliatory statute. (p. 130.)
 Sec. 1222 (now 51.33), Wis. Stats.

ARGUMENT

I

PLAINTIFF'S BUSINESS, PARTICULARLY THE INVESTMENT BRANCH OF IT, CONSTITUTES INTERSTATE COMMERCE.

As to the *policy* part of the business, the state court naturally felt itself concluded by the doctrine of *Paul v. Virginia* (8 Wall. 168), as recently applied in *New York Life Ins. Co. v. Deer Lodge Co.*, 231 U. S. 495.

The majority of the state court held it unnecessary to determine whether the investment part of plaintiff's business constituted commerce among the states. (Tr. fol. 127.)

The late Mr. Justice Timlin, dissenting, held that such business was interstate commerce, and that the statute, as construed by the majority, imposed an unlawful burden upon it. (Tr. pp. 13-15.)

In view particularly of the decisions of this court in the *Textbook* cases, and of their confirmation in the *New York Life* case, he regarded it as no longer open to doubt:

" * * * that carrying on a loan business involving the transmission of money and securities, with the necessary correspondence, instructions, vouchers and other writings, constitutes interstate commerce." (Tr. fol. 133.)

Such, we submit, is the necessary effect of these authorities.

International Textbook Co. v. Pigg, 217 U. S. 91.

International Textbook Co. v. Peterson, 218 U. S. 664.

Lottery Case, 188 U. S. 321.

And of many others later referred to.

The *Textbook* cases were regarded as controlling authority in,

Buck Stove Co. v. Vickers, 226 U. S. 205.

And have been distinguished or cited, but in no manner disapproved in numerous other cases.

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 511.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394, 397.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 202.

Blue Sky Cases, 242 U. S. 539, 558.

Looney v. Crane Co., U. S. Adv. Op., 1917, No. 3, p. 144.

1. The principle of the *Textbook* and *Lottery* cases rather than of the *New York Life* case applies to plaintiff's investment business.

The plaintiff contends that this business is more strongly commerce among the states than was the business before the court in the *Textbook* cases.

In the *Textbook* cases, the transactions before the court were thus interpreted (217 U. S. 91, 106):

"It involved, as already suggested, regular and, practically, continuous intercourse between the *Textbook* Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode

of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that: this mode—looking at the contracts between the Textbook Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states—particularly when it is in execution of a valid contract between them—is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph—‘a new species of commerce.’ ”

The reasoning upon which the court held that the above transactions constituted interstate commerce is strongly emphasized by its quotations from previous decisions of the court.

Thus the language of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189, is quoted:

“Commerce, undoubtedly, is traffic, but it is something more; it is *intercourse*.” (Italics the Court’s.)

From *Pensacola Telegraph Co. v. W. U. Telegraph Co.*, 96 U. S. 1, is quoted:

“It is not only the right, but the duty of Congress to see to it that *intercourse* among the states and *the transmission of intelligence* are not obstructed or unnecessarily incumbered by state legislation. This principle has never been modified by any subsequent decision of this court.” (Italics the Court’s.)

So, the decision of Judge Sanborn in *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 17, is quoted that:

"All interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." (*Italics the Court's.*)

After thus pointedly indicating that interstate commerce embraces "intercourse" among the states, which is not to be limited to goods, but extends to information and intelligence, the court said (p. 107):

"If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily incumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the constitution, especially where, as here, such intercourse and communication really relates to matters of regular, continuous business, and to the making of contracts, and the transportation of books, papers, etc., appertaining to such business."

In the *Textbook* cases the resident was engaged in the business of supplying to non-residents, for money consideration, *instruction*, the business essentially involving continuous interstate intercourse by mail, and also involving the transportation of such property as instruction blanks, charts, maps and books.

In the instant case, the resident is engaged in the business of acquiring from non-residents, for money consideration, *securities*, the business essentially involving continuous interstate intercourse, by mail and express, and the interstate transportation of notes, mortgages, bonds, insurance policies, abstracts, checks, drafts, interest installments, etc. (This will suffice for the analogy; it is not embrative of the full scope of plaintiff's interstate transactions.)

In both cases, the interstate intercourse is essential to the business,—in neither could the business live without it; in both cases the intercourse is practically continuous; in both cases are non-resident agencies employed, but with limited authority not extending to designation of terms or consummation of contracts; in both cases the intercourse is by the usual methods of interstate transportation. In both cases, moreover, there is involved the transportation of *property*, although here the analogy strongly favors the investment business.

In the *Textbook* cases, it appears to have been part of the contract that the property involved, namely, the *instruction documents*, should be for the exclusive use of those having scholarships from the company, (see statement 133 Wis. 302), and such property, in its nature, was not, as are *securities*, the usual and common subject of sale and commercial use.

- (a) Not a ground of distinction that the securities are acquired primarily for investment rather than for resale.

The instruction documents in the *Textbook* cases were purchased primarily for investment, or rather for personal use, as distinguished from purposes of resale.

So of the lottery tickets. They were forbidden to be dealt in both by the laws of the state where sent and of the states where received.

Lottery Cases, 188 U. S. 321, p. 371.

That the purpose of the importation or use thereafter is not controlling, see also:

Weber v. Freed, 224 Fed. (C. C. A.), 355, 358.

Same Case, affirmed, 239 U. S. 325, 329.

White Slave Cases, 227 U. S. 308, 323; *id.* 326.

(b) Not a ground of distinction as to the mortgage loans that they are not acquired in the open market, but rather from the maker of them.

It is difficult to see why interstate transactions, which are commerce if carried on with the middleman, are not equally so if carried on with the maker or producer; and whether the subject be wheat or negotiable securities, or instruction documents.

We take it that if a farmer in Minnesota should, by mail, make application to a resident of Wisconsin for the purchase by the latter of grain to be produced, transported and delivered to the Wisconsin purchaser, and to be subject to his acceptance, and the latter accepted the application by mail, and the grain were produced, transported and accepted, and remittance were made by mail to the farmer, we should clearly have a transaction in interstate commerce.

Robbins v. Shelby Taxing District, 120 U. S. 489, 494-497.

Caldwell v. North Carolina, 187 U. S. 622, 631, 632.

Crenshaw v. Arkansas, 227 U. S. 389.

Davis v. Virginia, 236 U. S. 697.

Rosenberger v. Pacific Exp. Co., 241 U. S. 48.
Stickney Co. v. Lynch, 163 Wis. 353.

How different is the case if the thing which the farmer is to and does in fact produce and deliver is his note, mortgage and abstracts of title, and that the delivery is by mail or express rather than by freight?

Are not the securities thus executed, offered for acceptance and in fact delivered by the farmer, pursuant to interstate negotiation and contract, the legitimate subjects of interstate disposition and delivery equally with the grain which he likewise produces, offers for acceptance and in fact delivers?

Or equally with a crayon portrait of the purchaser, which (save for the paper on which printed), would have no value unless accepted by the purchaser, and even then no commercial value?

Davis v. Virginia, 236 U. S. 697.

Or equally with instruction documents or lottery tickets?

(c) **The suggested grounds for distinguishing the mortgage loan business are even less applicable to the extensive and essential bond and policy loan part of plaintiff's investment business.**

(1) **Bond business.**

Plaintiff's bond purchases during the year 1911 amounted to over \$7,000,000. The total amount paid and sold during the year was \$1,450,000. Bond interest collected during the year was over \$3,000,000. (Table 1, Tr. p. 41.)

Plaintiff is required to extensively deal in these readily convertible securities, not alone for purposes of investment, but that it may make the advances

which its policyholders are entitled by law and by their contracts to demand. (Tr. fol. 169.) Purchases are chiefly made in the open market. Negotiations for purchase, delivery of bonds and making of payment is conducted through the common interstate channels of mail and express.

If instruction documents, lottery tickets, cheap portraits, prize fight films, and even human beings, are subjects of commerce, municipal and railroad bonds purchasable and purchased in the open market are undeniably subjects of commerce.

Textbook Cases, 217 U. S. 91; 218 U. S. 664.

Lottery Cases, 188 U. S. 321.

Davis v. Virginia, 236 U. S. 697.

Weber v. Freed, 239 U. S. 325, 329.

White Slave Cases, 227 U. S. 308, 320; *id.* 326.

There certainly is no room for the contention that such a bond is immobile like real estate, or that the purchase of it in open market involves a personal contract with the maker, or that it is without intrinsic or commercial value unless accepted by the purchaser, or that it is not purchased with the view to sale in the open market. Even if these considerations were applicable, plaintiff's regular and continuous interstate dealing in bonds bring them well within the principle of the *Textbook* cases.

(2) Policy loan business.

A large amount of advances on policies is made annually, totalling on December 31, 1911, nearly \$42,000,000, more than 93% being to non-residents. (Tr. fol. 159, 162, 171.) These advances are made pursuant to the provisions and upon the security of policies theretofore issued and delivered to the policy-

holder, and which had clearly become property and the subject of transfer and commercial use, as this court has had occasion to recognize.

Grigsby v. Russell, 222 U. S. 149, 156.

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 510.

New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 597.

In *Grigsby v. Russell*, *supra*, the court in holding that a policy of life insurance was assignable even to one having no insurable interest, said:

"On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property."

And under the Bankruptcy Act a life policy with a cash surrender value passes to the trustee. (Sec. 70-a.) This though not payable to the bankrupt, providing he has reserved the power to change the beneficiary.

Cohen, Trustee, v. Samuels, 245 U. S. 50.

We are now dealing with the policy *after it has been issued and delivered*, and has become subject to "use by the insured, not by the insurer." (231 U. S. 495, 510.) Such being the status of ownership, we have regular and continuous interstate intercourse in negotiation for and the making and completion of loans pursuant to, on the credit of, and secured by, the policy, involving the assignment and transportation of the policy, which is property (222 U. S. 149, 156), and the admitted subject of sale, transfer and commercial use, and also of checks or drafts for

the money advanced. May this, in reason, be differentiated from interstate intercourse involving the making of contracts for the furnishing of instruction, and the transportation of instruction documents pursuant thereto?

The assignment of the policy as security for a loan involves its qualified, rather than absolute, sale. But the subject matter being (at least after the policy is issued and in the hands of the insured) property of commercial value, and the elements of interstate intercourse and transportation being present, the character of the title transferred would seem immaterial. It is not an essential of commerce that there be an absolute sale, or, indeed, any sale at all.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17.

Cole Motor Car Co. v. Hurst, 228 Fed. 280, 283.
Weber v. Freed, 239 U. S. 325, 329.

(d) The grounds on which the Textbook cases have been distinguished in later cases emphasize their application in this case.

New York Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394.

The *Lottery* cases (188 U. S. 321), and the *Textbook* cases (217 U. S. 91), had intervened since the last preceding insurance case (*Nutting v. Mass.*, 183 U. S. 553), and these cases were strongly urged upon the court in the *New York Life* case. Their authority was not questioned, but they were distinguished (pp. 510, 511) as follows:

"The decision of the cases is that *contracts of insurance* are not commerce at all, neither state

nor interstate. This is the obstacle to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business *as demonstrating that its policies are interstate contracts*. We have replied to the attempt and shown that its manner of business *has no such effect*. It follows necessarily, therefore, that neither the *Lottery* case nor the *Pigg* case impugns the authority or the application of the cited cases. *They, the Lottery case and the Pigg case were concerned with transactions which involved the transportation of property and were not mere personal contracts.*" (Italics ours.)

This ground of distinction argues, as we submit, that the doctrine of the *Textbook* and *Lottery* cases and not of the *New York Life* case should be here applied. If instruction documents and lottery tickets constitute property which is the subject of commerce, so also do negotiable notes, bonds and mortgages, and policy loans. If the distinguishing line is whether the interstate intercourse involves transportation of property, this court has most clearly indicated on which side of the line the present case belongs. With stronger reason, is it on the same side with lottery tickets and instruction documents,—not on the other side with contracts of insurance.

This conclusion finds further support in the fact that:

(1) The decision in the *New York Life* case bears evidence in the dissent of two of the justices (Mr. Justice Hughes and Mr. Justice Van Devanter), and in the emphasis placed on *stare decisis*, that its doctrine is not to be extended further; and

(2) The court recognizes that even insurance *policies* may be the subjects of sale, collateral security and

other commercial purposes, though stating that "this use of them is after their creation, a use by the insured, not by the insurer,"—which differentiating consideration is not at all applicable to the securities involved in plaintiff's investment business.

In this connection we may note the suggestion in the *New York Life* case (by way of illustration merely), that communications by mail may be "incidents of a sale of real estate, (certainly nothing can be more immobile)," the illustration being used to point the argument that the use of the mails does not "give character" to the transactions of the parties to an insurance contract. It will not be overlooked that the important feature of the investment business here involved is not the purchase of *real estate*, which must, of course, be conceded to be "immobile," but the acquisition of negotiable securities *secured by* real estate, the subject matter, namely, the securities, being essentially mobile, and the subject of transfer and sale.

In *U. S. Fidelity Co. v. Kentucky* (231 U. S. 394), which involved the validity of a small license fee tax on those engaged in the business of inquiring into and reporting upon financial credit, the court, distinguishing it from the *Textbook* cases, (p. 398) said:

"In the case of the *International Textbook Company*, there was a systematic and continuous interstate traffic in instruction papers, textbooks, and illustrative apparatus for courses of study pursued by means of correspondence, and this was held to be in its essential characteristics commerce among the states within the meaning of the Federal Constitution, and entitled thereunder to exemption from any direct burden imposed by state legislation."

Within this distinction, and within the doctrine of the *Textbook* cases, clearly falls the present case with its "systematic and continuous interstate traffic" in negotiable securities.

- (e) In numerous cases in which the question has been directly presented the dealing in securities has been placed within the doctrine of the *Textbook* and *Lottery* cases and not within the doctrine of *Paul v. Virginia*.

Such has been the ruling of the district courts in many "Blue Sky" cases.

Alabama, etc., Trans. Co. v. Doyle, 210 Fed. 173, 183. (Judges Denison, Sessions and Tuttle.)

Compton Co. v. Allen, 216 Fed. 537. (Judges Smith, McPherson and Pollock.)

Bracy v. Darst, 218 Fed. 482, 495. (Judges Pritchard and Dayton.)

Halsey v. Merrick, 228 Fed. 805, 806. (Judges Denison, Sessions and Tuttle.)

Sioux Falls Co. v. Stockwell, 230 Fed. 236, note. (Judges Sanborn, Munger and Elliott.)

Geiger-Jones Co. v. Turner, 230 Fed. 233, 239. (Judges Warrington, Sater and Hollister.)

In *Alabama, etc., Trans. Co. v. Doyle*, *supra*, the court, after distinguishing *Paul v. Virginia* (8 Wall. 168), and *Nathan v. Louisiana* (8 How. 73), and referring to the *Lottery* cases (188 U. S. 321), said:

"But we cannot appreciate the force of any considerations whereby it might follow that, although lottery tickets are the subject of interstate commerce, bonds and commercial paper are not. They pass freely from hand to hand, title to many of them passing by delivery; they are subject to state taxation; they are protected

by state statutes against larceny; in an increasing volume from year to year they have come to take a most important place in the business and commerce of the country. They satisfy, in every respect, the essentials of the definition in the *Lottery* cases; indeed, they satisfy the more limited definition contended for in the minority opinion in that case."

And in *Bracy v. Darst*, *supra*, it was said:

"We do not think it can be longer questioned that stocks, bonds, debentures and other securities are subject matters of interstate commerce." (Citing, among others, the *Lottery* cases and the *Textbook* cases).

Like views were taken by the lower courts in the other "Blue Sky" cases above cited. These cases came before this court, and the state laws involved were sustained as legitimate police regulations affecting interstate commerce only incidentally. Whether the securities involved were the objects of interstate commerce was not determined.

Blue Sky Cases, 242 U. S. 539; *id.* 559; *id.* 568.

(f) Cases relied upon by the State distinguished.

The decision of this court in the *Blue Sky* cases (242 U. S. 539, 558), points the distinction between this case and others relied upon below by the state such as:

Nathan v. Louisiana, 8 How. 73, levying a small tax on money or exchange brokers.

Williams v. Fears, 179 U. S. 270, involving a state tax upon emigrant agents.

Ware v. Mobile Co., 209 U. S. 405, involving a small license tax upon the business of buying and selling futures.

Engel v. O'Malley, 219 U. S. 128, involving a statute prohibiting, except under certain conditions, in-

dividual bankers whose deposits did not average more than \$500 each from engaging in the banking business.

The *Ware* and *Engel* cases and others, including the *Trading Stamp* cases (240 U. S. 391), are referred to in the *Blue Sky* cases (242 U. S. 539, 558), as involving police regulations affecting interstate commerce only incidentally, and it was declared that with them the *Textbook* cases, *Buck Stove and Range Co. v. Vickers*, and the *Lottery* cases, "are not in discordance."

Of this line of cases it may also be said that they seem to have involved no necessary transportation of property from state to state, a further ground of distinction noted in *U. S. Fidelity Co. v. Kentucky*, 231 U. S. 394, 398, also relied upon below by the state.

2. Plaintiff's investment transactions are a necessary part, and not an incidental consequence, of its business, and are essentially interstate.

(a) The investment transactions are essential to the business.

There is no room to say (as was said of the credit reporting agency recently before the court), that:

"In the case of commercial agencies, the thing that is laid hold of as the subject of the excise is the business carried on within the state. If it have consequences extending beyond the borders of the state, and affecting interstate commerce, these are only incidental and fortuitous."

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394, 397.

Here the interstate investment transactions are the very life blood of plaintiff's business. Plaintiff's charter from the state, granted back in 1857, expressly authorized the investment of funds in securities, including mortgage loans, bonds and policy loans, "not only in the State of Wisconsin, but in all other states." (Tr. fols. 149,150.) Doing business, as it always has, upon the level premium plan, by which premiums and amount of indemnity are both fixed by the contract,—

"Without the ability to freely invest its funds upon advantageous rates and terms, the conducting of a life insurance business by plaintiff would be wholly impossible." (Tr. fols. 177,178.)

Throughout its life, plaintiff has availed itself of its chartered right to thus invest its funds within any of the states. Its outstanding contracts, aggregating over a billion dollars, have been made upon the faith of such chartered right. Numerous statutes of the state have not only recognized the right, but in common with the laws of other states, have imposed "the obligation to maintain a reserve for the meeting of its contracts, which reserve can only be maintained by the investing of its funds as aforesaid." (Tr. fols. 177-179.) And see Sec. 1951 (p. 134 App.), authorizing investment of funds in mortgage loans, bonds and policy loans, and expressly extending the authority to investment in other states.

With investments aggregating near \$300,000,000 (Tr. fols. 162, 167, 168); with over 95% of them acquired in other states (Tr. p. 171); with loan agencies in nineteen or more states (Tr. fol. 163); with an annual expenditure incurred in the carrying on of the investment business of over \$750,000 (Tr. fol. 170);

with the acquiring of these investment securities essential to business existence, and recognized by the state so to be from the beginning; with vast contractual obligations dependent for their fulfillment on the continued exercise of this essential and recognized right to acquire securities without regard to state lines,—it would be an idle claim that the investment part of plaintiff's business is a mere incident of its policy business, or that the interstate intercourse here present is but consequential. *Were plaintiff to stop its policy business altogether, the discharge of its contractual obligations, and compliance with the laws of the state, would compel the continued transaction of its investment business.*

The vital character of the investment business aside, it cannot be true that interstate commerce ceases to be such because carried on in connection with other business.

The Daniel Ball, 10 Wall. 557, 566.

Norfolk, etc., Co. v. Penn., 136 U. S. 114, 119.

- (b) That the mortgage loan transactions are largely conducted through special loan agencies does not change their interstate character.

This may scarcely be controverted. The agents solicit the loans and act as a convenient medium for consummating their acquisition. They do not accept applications, pass on titles, or form or terms of the note and mortgage, these, indeed, being prepared at the home office and sent to the applicant for execution, whereupon they are returned for approval. The application is made in one state and accepted in another; its acceptance involves transportation of the securities from one state to another and their acceptance in the latter; and the transportation of the

draft representing the consideration for delivery to the borrower in his home state. The interstate transmission of interest and principal is directly from borrower to company. (Tr. fols. 163-170.)

In this course of business, there is nothing akin to the case of a general agency which is supplied by the foreign principal, thus domiciled in the state, with goods or funds from which sales or purchases are, under general authority, effected and consummated and deliveries and payments made, intrastate.

Textbook Cases, 217 U. S. 91; *id.* 218 U. S. 664.

Caldwell v. North Carolina, 187 U. S. 622, 631, 632.

Crenshaw v. Arkansas, 227 U. S. 389.

Davis v. Virginia, 236 U. S. 697, 698.

Robbins v. Shelby Taxing District, 120 U. S. 489, 494-497.

As to the bond and policy loan part of the business, the interstate intercourse is direct rather than through the medium of loan agencies.

It may be proper to add that in some, at least, of the insurance policy cases, there would appear to have been room to hold that the transaction did not involve interstate commerce because of the general character of the agency, which, not uncommonly in the fire insurance business, authorizes signing and issuance of policy, receipt of premium, and general and complete power of negotiation and consummation of the entire transaction.

Paul v. Virginia, 8 Wall. 168, 183.

Ducat v. Chicago, 10 Wall. 410, 415.

Liverpool Ins. Co. v. Mass., 10 Wall. 566.

Philadelphia Fire Ass'n v. New York, 119 U. S. 110.

3. As to whether the policy part of the plaintiff's business constitutes interstate commerce.

However strong the conviction that the fire policy business involved in *Paul v. Virginia* (8 Wall. 168), and in like succeeding cases, was clearly distinguishable from the cases involving life insurance policies, particularly as that business is now conducted, and that they were not entitled to controlling significance in the recent *New York Life* case (231 U. S. 495), we hesitate to attempt reargument of this aspect of the present case.

(a) The doctrine of the policy cases should not be extended further.

That there are many practical differences between the fire policy business and the life policy business, and indeed, between the life policy business of fifty years ago and that of today, as regards both the character and commercial use of the policy and the manner of conducting the business, all will admit. The fact that the doctrine originally had to do with contracts of insurance which were not the subjects of commercial use, and that, as case followed case, broad expressions in previous decisions placing contracts of insurance generally outside the field of interstate commerce became authority for the extension of the rule to marine policies and then to life policies, until, even as regards the modern life policy, with its assignability and attributes of commercial use, the court felt itself bound to characterize the earlier cases as *stare decisis*,—argues strongly, as we submit, that, if the policy question be regarded foreclosed by the *New York Life* case, the rule applied thereto be extended no further.

That the controlling ground upon which the *New York Life* case was rested,—namely, that contracts of insurance are not the subjects of commerce,—is not applicable to the securities involved in plaintiff's investment business, we have endeavored to show. To place negotiable securities outside the pale of commerce, as insurance policies have been placed, and thus to exempt interstate dealing in them from the regulating power of Congress, is a long step, and one which no rule of *stare decisis* impels.

That there is now, for the first time, a case before the court in which both aspects of the insurance business, in its present vast development, are presented, may, we trust, be deemed reason for the reconsideration of the policy part of the business.

The question is, of course, one which concerns not alone the matter of state regulation, but the power of Congress, should occasion call for its exercise, over a business which has come to be not only national, but international, in scope, activity, and commercial importance.

As regards the fundamental matter of what may be and what may not be the legitimate *subjects* of interstate commerce, this court, unless it be with respect to insurance contracts, has consistently maintained the open door. There has been uniform recognition of the fact that to stamp a thing as not the subject of commerce at all, precludes the unhampered application of the commerce clause to the like subject matter when presented under differing conditions. This is an age of rapid changes. Matters regarded as exclusively of state control in one generation may become matters of Federal regulation in another. What may not be commerce today may

become commerce tomorrow. The life insurance business as conducted in the time of *Paul v. Virginia* bears about the same relation to the business as now conducted as does a cart to an express train. To close the door of *stare decisis* upon life insurance policies as the subjects of commerce makes them a conspicuous exception in the application of the truism that the commerce clause was made for all time and is to be applied to changing conditions as they arise. That the legitimate *subjects* of commerce, which are ever changing, may be defined by *stare decisis*, which negatives change, seems, indeed, somewhat incongruous.

- (b) The proposition on which the policy cases rest, namely, that contracts of insurance are not commerce at all, involves a limitation upon what may be the legitimate subjects of commerce, which is exceptional, and out of harmony with the general trend of authority.

The policy business involves, it is true, the making of personal contracts between the insurer and insured. But this is not all. *It involves interstate negotiation and intercourse, not as an incidental consequence, but as a regular, continuous and essential part of the business. It involves the transmission of money and valuable documents.* It involves, in common parlance, the sale of life insurance—the regular business of transportation and delivery, for an agreed consideration, *of the thing dealt in by the company under its chartered powers.* The thing thus dealt in, and which is transported and delivered as a result of the interstate intercourse is at least upon its interstate delivery, *an article of recognized commercial value and use.* (Tr. fol. 152.) And that which the

company (likewise by interstate transmission) receives in exchange for the article is money, or its equivalent—a thing of recognized commercial value and use, and, it would seem, an essential instrumentality of commerce.

Obviously, the elements of interstate intercourse and transmission are present. If any element be lacking, it is that the thing transported and delivered is not the legitimate subject of commerce. As to this, we think it fairly may be said that, *present the elements of interstate intercourse and transmission, the decisions have not hedged the power of Congress over commerce with limitations based on the character or value or use of the subject of the interstate transmission.*

This court has recently said:

“Congress is given power ‘to regulate commerce with the foreign nations and among the several states.’ The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary.”

Hoke v. U. S., 227 U. S. 308, 320.

“The interstate commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject.”

Rosenberger v. Pacific Express Co., 241 U. S. 48, 52.

“* * * it often has been pointed out that commerce among the states is a practical, not a technical conception.”

Davis v. Virginia, 236 U. S. 697, 698.

"The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons."

McCall v. California, 136 U. S. 104, 108.

Responding to the contention that an Act of Congress prohibiting the importation of prize fight films was not within its power to regulate commerce, since the purpose was rather to forbid their public exhibition than their importation, the court said:

"* * * if the imaginary premise and proposition based on it were acceded to, the contention would inevitably result in denying the power in Congress to prohibit an importation as to every article which, after importation *would be subject to any use whatever.*" (Italics ours.)

Weber v. Freed, 239 U. S. 325, 329.

The judicial conception evidenced by the foregoing quotations has a diversity of illustration in many cases which changing conditions incident to the progress of society have presented.

That the subject of importation or interstate traffic may, in itself, lack the elements of commercial or market value or use, is well illustrated by the lottery tickets, forbidden to be dealt in by the states from and to which transported.

Lottery Cases, 188 U. S. 321, 371.

Instruction documents for the exclusive use of the subscriber (133 Wis. 302).

Textbook Cases, 217 U. S. 91, 106. And see *International Textbook Co. v. Gilluespie*, 129 S. W. 922 (Mo.).

Peterson v. Hofteiser, 150 N. W. 934, 935 (S. D.)

Portraits (\$1.98 each) probably not intended for sale or salable except to the subject of them.

Davis v. Virginia, 236 U. S. 697, 698.

Prize light films, intended for exhibition rather than sale.

Weber v. Freed, 224 Fed. 335, 358; 239 U. S. 325.

Contracts involving interstate shipments on consignment rather than sales.

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 17. (Judges Sanborn, Van Devanter and Philips.)

Cole Motor Car Co. v. Hurst, 228 Fed. 280, 283. (C. C. A.)

The interstate business of leasing, rather than selling, machinery.

U. S. v. U. S. Machinery Co., 234 Fed. 127, 143.

Contracts of theatrical booking agencies involving interstate transportation of performers and stage properties.

Marienulli v. United Booking Offices, 227 Fed. 165, 167.

Interstate collection and delivery of laundry.

Kansas City v. Seaman, 160 Pac. 1139 (Kan.).

By the cases involving the transmission, not of tangible things, but of intelligence or information, by telegraph or telephone, and seemingly irrespective whether the message relate to business or pleasure, or whether transportation of persons or property may ensue from it.

Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 9, 12.

Tel. Co. v. Texas, 105 U. S. 460.

W. Union v. Pendleton, 122 U. S. 347, 356.

Richmond v. Tel. Co., 174 U. S. 761.

By the transit of persons from one state to another irrespective of means or purpose of transportation.

Passenger Cases, 7 How. 283.

Covington Bridge Co. v. Kentucky, 154 U. S. 204, 218.

White Slave Cases, 227 U. S. 308, 326.

The mention of these examples of recognized subjects of commerce, at once suggests the impracticability of making any standard of weight or dimension, or measure of intrinsic or commercial value or use, or nature of title transferred, the test of what may constitute the legitimate subjects of interstate commerce. They demonstrate, as we submit, that, given interstate intercourse actually involving transmission between the states, the nature or value of the thing transported is unimportant. Thus only, as it seems to us, may the cases be reconciled.

(c) Recent legislation suggestive of importance of Federal power of regulation of insurance business in both its branches.

That the occasion for Federal control may arise, and that the power should not be lacking, is, at least, suggested by recent legislation.

(1) War risk insurance of vessels and cargoes:

See Act of Sept. 2, 1914, Ch. 293 (Fed. Stats. Ann., 1916, Supp., p. 283) entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department."

This act, adopted long before our entry into the war, contains, as its first recital:

"Whereas, the foreign commerce of the United States is now greatly impeded and endangered

through the absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war," etc.

And makes provision for Government insurance of vessels and cargoes, against the risks of war (in which we were not then engaged).

(2) Convertible term insurance of soldiers and seamen:

Note Act of Oct. 6, 1917 (Fed. Stats. Ann., Supp. Oct. 1917, p. 151), making provision for the insurance of soldiers and seamen. (Art. IV, Sec. 400.)

This Act is significant (1) in that the non-assignability and exemption from claims of creditors which are expressly provided for, point the differentiating property characteristics of the policies of private companies; and (2) in that it embarks the Government in an insurance business, in many respects analogous to that conducted by private companies and not limited to the duration of the war, but, in its provision (sec. 404) for convertibility within five years after the war into "such form or forms of insurance as may be prescribed by regulations and as the insured may request," including "ordinary life, twenty payment life, endowment" and "other usual forms of insurance"—for an almost indefinite period.

What occasion, or perhaps necessity, the administration of this act may hereafter create for the exercise by Congress of regulatory power over private companies engaged in the like business, may not be foretold. Already conducting the largest life insurance business in the world (risks now about \$8,000,000,000.00) and confronted with its continuance for a generation after the war, reinsurance with private companies, and federal regulation of them, is but

one of the not improbable contingencies of the future that suggests the importance of the federal power, under the commerce clause, to regulate the business of life insurance.

Indicative of legislative trend are Senate Bill No. 3475, and House Bill No. 6361 (Sec. 405 *et seq.*), on Senate calendar Oct. 2, 1917, embracing regulatory provisions applicable to life insurance companies,—the former relating to proofs of death and payment of policies and the latter (which we are informed has passed both Houses) providing for deposit with the insurer of government bonds as security for premiums and preventing forfeiture for their non-payment. Also the pending House Bill No. 3570 embracing regulatory provisions apparently designed to better safeguard government advances or deposits on the security of fidelity bonds of private companies.

(3) Federal Reserve and Farm Loan Banks:

Of significance, also, is the Act providing for Federal Reserve Banks (Act of Dec. 23, 1913; Fed. Stats. Ann. Supp. 1914, p. 260).

Referring to this Act, "with its chain of banks and the necessity of a continual transmission of money, notes, bonds and securities from one state to another," Justice Timlin, in his dissenting opinion below, regarded it as an event in the development of federal and state relations under the Federal Constitution. (Tr. fol. 133.)

This Act, which provides for bringing into and making a part of the Federal Reserve system, a vast number of privately owned banking institutions, including those of state organization, appears to involve a much broader exercise of the incidental pow-

ers of Congress than those on which were rested the decision in *McCulloch v. Maryland*, 4 Wheat. 316.

Among the substantive powers to which those involved in that case were regarded as incidental, was the power to regulate commerce. With the interchange of commercial paper and securities contemplated by the Federal Reserve Act, it was apparently the thought of Mr. Justice Timlin, that the legislation must, in even larger measure, rest on the commerce clause. Already has been presented the question whether certain features of the Act were within the doctrine of the Federal Bank cases.

First Nat'l. Bank v. Union Trust Co., 244 U. S. 416.

And note Federal Farm Loan Act of July 17, 1916, Fed. Stats. Ann., Supp. Oct. 1916, p. 3, entitled: "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes."

(4) State Retaliatory Laws:

Examples might be multiplied of conflicting regulations, tax requirements, etc., which have ensued from the exercise of unrestrained state authority. The states themselves have perhaps supplied the strongest evidence that the business as now conducted is well within the reasons which led to the commerce clause, by their general adoption of so-called retaliatory laws, similar to Sec. 51.33, Wis. Stats., which provides that whenever the law of any other state shall require any deposit of securities, or

the payment of taxes, license fees, etc., greater than the amount required by the laws of Wisconsin from similar foreign companies doing business in Wisconsin, then the like burdens should be laid on such foreign companies. (Tr. pp. 28, 29.)

The like frank expression of retaliatory purpose is to be found in an old act of Massachusetts, entitled, "An Act to enable the Citizens of this Commonwealth to discharge the debts due from them to Citizens of certain other States in the same manner as the Citizens of those States are enabled by law to discharge debts due from them to the Citizens of this Commonwealth." (Laws of Mass. 1780-1800, Vol. 1, p. 336.) Many acts of the original states illustrate (though not so frankly avowing the retaliatory purpose), the "rival, conflicting and angry regulations" incident upon the separate exercise of power by the states. (3 Farrand, Records of Fed. Convention, 547-548, 542.) The correction of this evil was one of the important objects of the Federal Constitution.

1 *Story, the Constitution*, Sec. 249.

1 *Farrand, Records of Fed. Convention*, 275.

To hold that a business like that of plaintiff constitutes interstate commerce does not, of course, displace all state control. Pending the exercise of the federal power, there remains with the states the power to make all such police regulations as may not unduly burden commerce.

Blue Sky Cases, 242 U. S. 539, 558.

Nor is state power of taxation unjustly hampered by the requirement that it be exercised with due regard to the freedom of commerce, and to other constitutional limitations.

II

**THE STATUTE NECESSARILY OPERATES AS A
DIRECT BURDEN ON PLAINTIFF'S INTERSTATE
COMMERCE BUSINESS.**

Passing, without decision, the question whether the investment business of plaintiff was interstate commerce, the majority of the state court held that if so, "the tax places no burden upon that business." The court said (Tr. fol. 127):

"It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not as it pleases. If it does not do so it may transact all the investment business which it desires to transact without paying any license fee under the law.

"It is very well established by federal decisions that when the state exercises its legitimate and rightful power of taxation of an occupation or privilege it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable." Citing: *Maine v. G. T. R. Co.*, 142 U. S. 217; *Flint v. Stone-Tracy Co.*, 220 U. S. 107; *Baltic Mining Co. v. Mass.*, 231 U. S. 68.

- 1. In determining whether the statute directly burdens commerce, the controlling test is its practical operation and effect, as to which the views of the state court are not conclusive on this court.**

This is fundamental.

Galveston, etc., R. R. Co. v. Texas, 210 U. S. 217, 227.

U. S. Express Co. v. Minnesota, 223 U. S. 335, 346.

St. Louis S. W. R. Co. v. Ark., 235 U. S. 350, 362.

Kansas City R. Co. v. Kansas, 240 U. S. 227, 231.

Crew Levick Co. v. Penn., U. S. Adv. Ops. (1917) No. 3, p. 123.

In the case last cited, decided at this term, the court, by Mr. Justice Pitney, thus expresses the rule:

"As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts."

2. **The view of the state court that the payment of the license fees was only a condition upon the transacting of the life insurance business, as distinguished from the investment part of it, ignores the substance and necessary effect of the statute.**

On the theory adopted by the state court, the states might burden commerce at pleasure. It would only be necessary to impose the conditions in form upon some intrastate part of a business, albeit so to do would result in the destruction of the interstate part.

It already has been noted that the factor of interest accumulations upon investments, and the ability freely to invest its funds, are essential to the life of plaintiff's business, that such right of investment has always been recognized by the laws of the state, and that plaintiff's contracts have been made upon the faith of its continued exercise. (Tr. fols. 177, 178.)

By the express terms of the statute the fee is required of "every company * * * transacting *the business of life insurance* within this state," and is required "as an annual license fee for *transacting such business.*" The statute applies indiscriminately to both domestic and foreign companies, makes no distinction as between intrastate and interstate business, and none as between branches or departments of the life insurance business. The fee is based on gross income for the *preceding* calendar year, and is payable on or before March 1 of each year; the statute (Subsec. 4) contemplates that the payment of the fee shall be evidenced by a license which, "*when granted*, shall authorize the company * * * to transact business *until* the first day of March of the *ensuing* year, unless sooner revoked or forfeited." (Secs. 51.32 and 51.34; Appendix, pp. 131, 133.)

Obviously, these provisions require advance payment and license. That such payment and license are conditions precedent is further manifested by other statutory provisions.

See Subsec. 5, Sec. 1947 and Sec. 1948. (Appendix, pp. 133, 134.)

And note that Subsec. 5 of Sec. 1947 cannot be construed as making the license fee payable only for the privilege of issuing policies; (1) because other statutes contemplate that domestic companies must of necessity transact other business, including the investment business. Sec. 1951 authorizing and contemplating investment of funds in other states; Sec. 1952, making interest not exceeding $4\frac{1}{4}\%$ an essential factor in valuing policies; (Appendix, p. 135); (2) the prohibition of this subsection applies to every "life insurance corporation whatever," and

is against the doing of "any business in this state" until the license shall be procured and the fee paid; (3) that the same is true of Subsec. 1, Sec. 1917 (Appendix, p. 136), in which section the word "therefor" obviously relates to insurance business, thereby indicating that the same word in Subsec. 5, Sec. 1947, was intended to have a like meaning; and (4) that Sec. 1948 was added to the statutes by Chapter 132, Laws of 1907, and subsequent to Sec. 1947, and that here again the prohibition is upon the transaction of any business in the state, and the license "therefor" obviously has reference to license to transact any business.

These statutes do not leave it open to doubt that the license and fee provided for were required and necessarily operated as a condition of the exercise of the privilege of transacting in Wisconsin *any* business of life insurance, including its investment branch.

That such is the necessary effect of the statute is further demonstrated by the express provision laying the tax upon "gross income from *all sources*" (except rents of real estate and non-resident premiums). These sources, as the state insists, and as the state court held, embrace investment income from *without the state*.

And by the facts pleaded as regards the enforcement of the statute by the state officials, it being alleged:

"That thereupon and prior to the first day of March, 1912, said defendant by its Commissioner of Insurance and the State Treasurer demanded, and so notified said plaintiff, that it must pay a license fee or tax on the sum of \$16,073,107.00 (which included gross investment income), and in case of its refusal to pay the

license fee or tax of 3% upon the amount aforesaid, would withhold any license to the company to transact business from and after the first of March, 1912, and would refuse to permit said plaintiff on and thereafter to transact *any business in the state.*" (Tr. fol. 194.)

The practical fact is that if the plaintiff complies with the law and with the obligations of its contracts it must transact its interstate investment business. It cannot transact the policy part of the business of life insurance unless it does so. It cannot transact *any* business of life insurance,—policy or equally essential investment business,—unless it first obtains a license and pays 3% of its gross investment income. To otherwise view the operation of the statute not only ignores the facts pleaded but common knowledge as well. It grasps the shadow and rejects the substance.

Crutcher v. Kentucky, 141 U. S. 47, 56.

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 227.

Ludwig v. Western Union Tel. Co., 216 U. S. 146, 160.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30.

International Textbook Co. v. Pigg, 217 U. S. 91.

Oklahoma v. Wells-Fargo Co., 223 U. S. 298.

3. Because the statute thus in substance and effect operates to impose as conditions upon the right of plaintiff to transact the investment, as well as the policy part of the business, the obtaining of a license and the payment of the fees, the statute imposes a direct and unlawful burden on interstate commerce.

It is clearly settled that a state law which in substance and effect makes it a condition of the right of a corporation to engage in interstate commerce business, that it shall obtain a license, file statements, pay license fees, or the like, is a direct and unlawful interference with such commerce.

International Textbook Co. v. Pigg, 217 U. S. 91, 108, 111, 113, and cases cited.

This holds true though the condition is in form upon the right to transact intrastate business.

Crutcher v. Kentucky, 141 U. S. 47, 56, 59.

W. U. Tel. Co. v. Kansas, 216 U. S. 1, 30.

Ludwig v. W. U. Tel. Co., 216 U. S. 146, 160.

Textbook Cases, 217 U. S. 91, 104, 110, 111.

St. Louis, etc., Ry. Co. v. Arkansas, 235 U. S. 350, 368.

Looney v. Crane Co., U. S. Adv. Ops., 1917, No. 3, pp. 144, 147.

And even though license fees thus exacted as a condition are (contrary to the fact here) based upon intrastate business, and would have constituted a valid tax had collection been left to ordinary means and payment not been made a condition upon the right to transact business.

St. Louis, etc. Ry. Co. v. Arkansas, 235 U. S. 350, 363, 368.

Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 695.

4. Because the statute, as construed by the court and as applied to plaintiff, lays the tax on gross earnings, including those derived from interstate business, it directly and unlawfully burdens commerce.

Justice Timlin, dissenting, considered (Tr. fols. 134, 135) that the statute, so construed, directly burdened interstate commerce, and that to avoid this result, it should have been construed "so as to include only such sources as the state legislature had jurisdiction to include in the base of computation, and so as to exclude income derived from interstate commerce," citing:

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28.

Elwell v. Adder Machine Co., 136 Wis. 82.

The majority of the court did not discuss this construction of the statute inasmuch as it took the view that even though plaintiff's investment business was interstate commerce, the state might lawfully *measure* a tax by gross income, including that derived from the investment business (Tr. fol. 127). This conclusion was come to on the authority of *Maine v. G. T. Ry. Co.*, 142 U. S. 217, *Flint v. Stone-Tracy Co.*, 220 U. S. 107, and *Ballic Mining Co. v. Mass.*, 231 U. S. 68.

- (a) An unrestricted gross earnings tax is a direct burden on commerce.

The view of the state court was in conflict with a long line of cases, which establish the principle that

a license fee or tax laid on gross earnings, including those derived from interstate commerce, operates directly and unlawfully to burden such commerce.

Fargo v. Hart, 193 U. S. 490.

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 224.

W. U. Tel. Co. v. Kansas, 216 U. S. 1, 36, 48.

Pullman Co. v. Kansas, 216 U. S. 56.

Ludwig v. Western Union Tel. Co., 216 U. S. 146.

Atchison, etc., Ry. Co. v. O'Connor, 223 U. S. 280, 285.

Oklahoma v. Wells-Fargo & Co., 223 U. S. 298, 301.

Choctow & Gulf R. R. Co. v. Harris, 235 U. S. 292, 298, 299.

St. Louis Ry. Co. v. Arkansas, 235 U. S. 350, 363.

Kansas City Ry. Co. v. Kansas, 240 U. S. 227.

Crew Levick Co. v. Penn., U. S. Adv. Ops. 1917 (No. 3), pp. 122, 124.

Looney v. Crane Co., *id.* pp. 144, 147.

The principle applies whether the corporation thus taxed is one created by the taxing state or one organized under the law of some other state.

Philadelphia Steamboat Co. v. Penn., 122 U. S. 326.

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 224, 225, 228.

Harman v. Chicago, 147 U. S. 396.

Sault Ste. Marie v. International Co., 234 U. S. 333, 341.

Kansas City Ry. Co. v. Kansas, 240 U. S. 227, 233-235.

Crew Levick Co. v. Penn., U. S. Adv. Ops. 1917
(No. 3), p. 122.

And it makes no difference by what name the burden is called, or that it may be the principal tax imposed.

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217,
227.

Crew Levick Co. v. Penn., *supra*.

Minnesota Rate Cases, 230 U. S. 352, 400.

Or that the tax applies to internal as well as to interstate business.

Crew Levick Co. v. Penn., *supra*.

Freight Tax Case, 15 Wall. 232, 277.

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217,
228.

(b) The application of foregoing principle to the facts here presented.

Plaintiff's gross investment income for 1911 on which the 3% tax was laid amounted to over \$12,-500,000, the tax on same amounting to over \$375,000. (Tr. fol. 192.) Upwards of 93% of the income was received from non-residents in interstate intercourse. (Tr. p. 171.) The 1912 figures were somewhat in excess of these. (Tr. p. 41.)

The tax is, in terms, exacted for the privilege of transacting the insurance business within the state. It is characterized by the court below as a "privilege or occupation tax." While stated to be in lieu of other taxes (save those on real estate) the statute has no relation to a property tax or to an income tax. It bears no evidence that it was remotely intended as a fair measure of either. Obviously a 3% tax on

gross investment income and Wisconsin premium receipts has no connection with, and is not even an attempted measure of, a personal property tax. It is equally obvious that being laid on gross income, including domestic premiums and excluding non-resident premiums, and without deduction for expenses, losses, or reserve requirements, it cannot be regarded as an attempted measure of an income tax.

This is emphasized by the fact that though in terms applicable to both domestic and foreign corporations, and in terms covering as to each the like privilege, the foreign company (which might have much or little personal property or income subject to local taxation) is taxed \$300 plus such additional amount, if any, as its own state happened to exact of like Wisconsin companies—demonstrating that as to foreign corporations (and by the same token as to domestic companies) the statute was framed wholly without reference either to personal property or net income subject to the taxing jurisdiction of the state.

That the tax is not "ascertained by reference" to an "ordinary tax" upon property or income, nor as "a just equivalent" therefor (*Galveston* case, 210 U. S. 217, 227), see further and especially pp. 90 to 93 hereof.

The payment and collection of the interest involved in the gross income covered by the tax constitute part of plaintiff's continuous interstate business. Such income is the inducement to and an essential part of such business, without which it cannot live, and the income is paid and received in virtue of the securities which are the subject of the commerce. Taxation of the gross income derived from an inter-

state commerce investment business may as easily burden it out of existence as like taxation of any other business.

The gross income which is made the base of the tax fluctuates with and has a direct and necessary relation to the amount of business transacted. To lay a tax upon it necessarily operates as a direct burden. This may be concretely demonstrated as follows:

Had the plaintiff transacted none of its interstate investment business in 1911, the investments would have been less by over \$40,000,000. This would represent an average loss of interest or income (assuming interest at $4\frac{1}{2}\%$ for half the year only) of around \$900,000. (Tr. fols. 167, 168, 171; pp. 41, 42.) Its investments being largely long time *this loss would be projected into future years*. But even with the latter consideration aside, the immediate burden on the 1911 business *directly dependent on the amount of business done that year, and which would have been more or less according as the volume was more or less*, was upwards of \$27,000.

Were the *extent* of the burden the controlling factor precedent has uniformly condemned any such burden as this.

Galveston, etc., Ry. Co., v. Texas, 210 U. S. 217, 224.

Southern Ry. Co. v. Greene, 216 U. S. 400, 404.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 7.

Pullman Co. v. Kansas, 216 U. S. 56, 61.

Ludwig v. W. U. T. Co., 216 U. S. 146, 159.

Baltic Mining Co. v. Mass., 231 U. S. 68, 87.

But the extent of the burden is not decisive.

"It is thus manifest on the face of all the cases, that they in no way sustained the assumption that, because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution."

Looney v. Crane Co., supra.

The directness of the burden is even more apparent when the tax is considered in its relation to the expense of conducting the investment business. This expense amounts to over \$750,000.00 annually, and more than 95% of it is incurred in carrying on the business with residents of other states. (Tr. fol. 170.) About 95% of the business carried on is interstate commerce. The income which comes to the plaintiff from its investment business, and which, *in any event*, could become merged in its assets and subjected to personal property taxation, is not the *gross* income on which this tax is laid, but such income *diminished by the expense and losses incident to the carrying on of the business from which the income is derived. The tax is thus laid upon and enhances the direct expense and burden of pursuing the business, and its amount fluctuates with the amount of gross business done.*

The same is true as regards income taxation. Speaking of the Wisconsin income tax law, adopted in 1911 (after the statute in question, and which largely superseded personal property taxation), and differentiating a tax on gross receipts from the income tax (as regards whether the latter burdened

commerce) the Wisconsin Supreme Court recently said:

"The (income) tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts or the property employed in interstate commerce. In fact the tax deals only with that part of the fruits of such commerce which remain as the net proceeds after all the immediate burdens of the commerce have been discharged and such net profits are merged in the assets of the corporations."

United States Glue Co. v. Town of Oak Creek,
161 Wis. 211, 221.

Applicable in principle to this tax is the statement of this court in *Crew Levick Co. v. Penn.*, *supra*:

"It operates to lay a direct burden upon every transaction in commerce by withholding for the use of the state, a part of every dollar received in such transactions. * * * That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce and hence is a direct burden upon it."

If the obstacle that the tax is laid directly upon the gross return which ensues from, and is a part of, the interstate business, were removed, the fact would still remain that it is laid directly upon a gross income (over 93% interstate) which exceeds, by the sum of the expense and losses incident to carrying it on, the amount which, in any event, could be the subject of personal property or income taxation. These expenses and losses, of course, fluctuate with the amount of interstate business transacted.

The burden is thus direct and immediate and is without limitation or restriction. It may be diminished only by transacting less of interstate commerce

business. The transaction of more is upon the penalty of an increase in the tax. See especially:

Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 224.

Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302.

St. Louis, etc., Ry. Co. v. Arkansas, 235 U. S. 350, 353, 363, 364.

Kansas City Ry. Co. v. Kansas, 240 U. S. 227.
Crew Levick Co. v. Penn., *supra*.

5. The cases on which the state court rested its decision have no application.

These cases were:

Maine v. G. T. Ry. Co., 142 U. S. 217.

Flint v. Stone Tracy Co., 220 U. S. 107.

Baltic Mining Co. v. Mass., 231 U. S. 68.

That these cases were not intended to modify the doctrine of the *Galveston* and other cases above cited, is manifested by the opinions. If there was room for the misinterpretation of them, however, it was removed by the decisions:

St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350.

Kansas City R. Co. v. Kansas, 240 U. S. 227.

In which both lines of cases were discussed and the distinction between them clearly drawn; as it has again been drawn in the recent decisions at this term:

Crew Levick Co. v. Penn., *supra*.

Looney v. Crane Co., *supra*.

The one involving a tax upon the business of a

domestic corporation and the other both a permit and a franchise tax upon a foreign corporation.

In these last two cases were distinguished also the cases of

Kansas City, etc., Ry. Co. v. Stiles, 242 U. S. 111.

U. S. Express Co. v. Minn., 223 U. S. 335, 347.

And others of the authorities relied upon by the state.

These cases make it clear, we submit, that within the field of illegitimate exaction must be placed:

(a) Cases like the one now before the court, wherein, in substance and effect, the obtaining of the license and the payment of the tax are made conditions precedent upon the transaction of the interstate commerce business, and collection of it is not left to the ordinary means (which alone condemns the tax) and;

(b) Cases also like that now before the court, wherein the tax is directly laid upon the gross income from the interstate business, fluctuates with the amount of business transacted, enhances the expense of carrying it on, *and is without the saving grace of a prescribed maximum or other conditions so restricting its operation as to make it clear that no substantial or direct burden results.*

6. It is not material whether the state could impose an equivalent burden by some other form of tax.

Whether the state could, by some form of personal property or net income taxation, accomplish similar exaction is, of course, beside the question.

Home Savings Bank v. Des Moines, 205 U. S. 503, 520.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664.

Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302.

In the *Des Moines* case, the court, at page 519, said:

"But the two kinds of taxes are not equivalent in law, because the state has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence."

As stated in the *Oklahoma* case:

"Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

Apart from this, and as later pointed out (pp. 106-116 hereof) there is no foundation for the claim that, consistently with constitutional limitations and state policy, any burden approaching that here presented could have been lawfully imposed.

7. Nor is it material that plaintiff's domestic investment income (comparatively slight) is taxed at the same rate as its interstate income.

As this court has said:

"Interstate commerce cannot be taxed at all, even though the same amount of tax should be levied on domestic commerce."

Robbins v. Shelby Taxing District, 120 U. S. 489, 497.

Minnesota v. Barber, 136 U. S. 313, 326.

Brennan v. Titusville, 153 U. S. 289.

III

THE STATUTE DENIES EQUAL PROTECTION IN THAT IT ARBITRARILY DISCRIMINATES AGAINST DOMESTIC AND IN FAVOR OF FOREIGN COMPANIES.

- 1. The statute imposes a privilege or occupation tax, which is within the protection of the Fourteenth Amendment.**

The state court held that:

"It is clear that this so-called license fee is a privilege or occupation tax, and that, * * * it is subject * * * to the clause guaranteeing the 'equal protection of the laws' contained in the Fourteenth Amendment to the Federal Constitution." (Tr. fol. 115.) To the same effect see:

State v. Railway Co., 128 Wis. 449, 497.

Nunnemacher v. State, 129 Wis. 190, 218, 219, 220.

Beals v. State, 139 Wis. 544, 556, 557.

Black v. State, 113 Wis. 205, 218, 219.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111, 112.

- 2. The equality clause is applicable to domestic corporations, and precludes arbitrary classification.**

(a) That this constitutional guaranty is applicable to corporations, both domestic and foreign, was also recognized in the decision of the state court. (Tr. fol. 116.) And see:

Santa Clara County v. Southern Pacific Railroad, 118 U. S. 394.

Cotting v. Kansas City Stockyards Co., 183 U. S. 79.

Southern Railway Co. v. Greene, 216 U. S. 400.

Ex parte Schollenberger, 96 U. S. 369.

(b) And it further held that the state could no more discriminate against its own corporations than it could discriminate against the corporations of another state. (Tr. fol. 116.) And see:

Yick Wo v. Hopkins, 118 U. S. 356, 369.

State v. Hoyt, 71 Vt. 59; 42 Atl. 973, 975.

State v. Cadigan, 73 Vt. 245; 50 Atl. 1079, 1081.

State v. Hinman, 65 N. H. 103; 18 Atl. 195.

State v. Pennoyer, 65 N. H. 113; 18 Atl. 878.

Bliss' Petition, 63 N. H. 135.

State v. Doran, 28 S. D. 486; 134 N. W. 53.

Wiley v. Palmer, 14 Ala. 627.

Oliver v. Washington Mills, 11 Allen, 268.

In re Stanford's Estate, 54 Pac. 259; 58 Pac. 462. (Cal.)

McGuire v. Parker, 32 La. Ann. 832.

Ward v. Maryland, 12 Wall. 418.

Blake v. McClung, 172 U. S. 239, 258; 176 U. S. 59.

1 Cooley, Taxation (3rd Ed.), 168, 169.

Cooley, Const. Lim. (6th Ed.), 597.

(c) Whether the "great difference in treatment" of domestic as compared with foreign companies was within the field of legitimate classification was declared by the state court to involve the question:

"Are there any real differences between the two classes (domestic and foreign) which bear a just and proper relation to the attempted classification and justify this difference of treatment?" (Tr. fol. 117.) And see:

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559.

Gulf Ry. Co. v. Ellis, 165 U. S. 150, 165.

Southern Ry. Co. v. Greene, 216 U. S. 400, 416-418.

Black v. State, 113 Wis. 205, 219.

State v. Whitcom, 122 Wis. 110, 118, 119.

Servonitz v. State, 133 Wis. 231, 237.

Beals v. State, 139 Wis. 544, 555, 557.

State ex rel. Atty. Gen. v. Donald, 161 Wis. 188, 193.

- 3 There is no difference between the domestic and foreign company as regards the purpose or object of the statute, the nature or extent of the privilege for which the fee is exacted, nor in the burdens of state supervision or regulation which the business imposes.**

As applied to both classes alike the purpose and object of the statute must be admitted to be the raising of revenue by a tax upon the privilege of transacting the life insurance business within the state. Its language is that "every company * * * transacting the business of life insurance within this state" shall pay the prescribed schedule of fees "for transacting such business." (Sec. 51.32; Appendix, p. 131.) The provision that the fee so to be paid shall be in lieu of all other taxes (except those on real estate) indicates that the measure was as to both classes a revenue one, and that the revenue was to be obtained by a tax laid upon the *business*, in lieu of other methods of taxation. Such was the view of the statute in substance adopted by the

state court, which characterized the fee as a "privilege or occupation tax." This view was in line with its previous decisions, in which it had been declared that "the license fee is levied upon the *business*, and not upon the companies transacting it."

Travelers Ins. Co. v. Fricke, 94 Wis. 258, 264.

Travelers Ins. Co. v. Fricke, 99 Wis. 367, 370, 374.

State ex rel. F. & C. Co. v. Fricke, 102 Wis. 107, 112.

C. & N. Ry. Co. v. State, 128 Wis. 553, 589.

The statute contains no suggestion that the privilege for which the fee is paid shall be any broader as to the domestic than as to the foreign company, nor does it suggest any difference in the nature or character of the privilege. What each class pays for is the like privilege of transacting the like life insurance business within the state. (Tr. fol. 184.)

The foregoing considerations tend to differentiate the case of *Kansas City, etc., Co. v. Stiles*, 242 U. S. 111, where the tax was designated as a franchise tax, and regarded as laid upon different privileges—the franchise of the domestic corporation to exist and of the foreign corporation to transact business within the state. The statute here in question does not purport to be a franchise tax and, as to both classes, is laid on the identical privilege of transacting the like business.

The identity of the privilege for which the tax is exacted is emphasized by the fact, averred in the complaint, that both classes are (except as to taxation), "subject to like state regulation and supervision." (Tr. fol. 179.) The more important ex-

amples of similarity of state supervision and regulation are embraced in the following Wisconsin statutes. (Appendix, pp. 136, 137.)

By Subsec. 1 of Sec. 1915, foreign stock companies must have a paid-up cash capital equal to that required of domestic companies, and mutual companies are admitted to the state "subject to the same requirements as to solvency and the same limitations as to expenses as like companies of this state."

By Subsec. 2 of Sec. 1916, the commissioner of insurance is given the same supervision and required to make the same examination of foreign as of domestic companies doing the same kind of business.

And by other sections of the statutes, relating to the making and filing of reports, etc., both foreign and domestic companies are placed on a parity. (Sections 1950, Subsec. 1 of Sec. 1953*n*, and Sec. 1954.)

There is, therefore, no ground upon which to base the claim that the difference in treatment may be justified by a difference in the purpose of the law, or character or extent of privilege granted, or in burden of state supervision or regulation.

4. The fact that one class is domestic and the other foreign does not justify the difference in treatment.

This was recognized by the state court in the language:

"* * * the question arising is simply whether there is any substantial difference, *other than the difference between foreign and domestic corporations, which differentiates the two classes and which justifies such great difference in treatment.* The question is by no means an easy one." (Tr. fol. 116; italics ours.)

- (a) Being "persons" within the Fourteenth Amendment, difference in place of organization or source of powers or privileges does not justify difference in treatment.

This is illustrated by two recent decisions of this court:

Southern Ry. Co. v. Greene, 216 U. S. 400, 416-418.

Kansas City, etc., v. Stiles, 242 U. S. 111.

In the first of these cases the state of Alabama imposed on foreign corporations lawfully doing business in the state, but not on domestic corporations, an annual franchise tax on all capital employed in the state, the tax being in addition to the license and property taxes to which all corporations, domestic and foreign, were already subject. The additional tax thus imposed approximated $1\frac{1}{2}\%$ (1% to the state and one-half the amount to the county). The burden amounted in the case of the plaintiff to \$22,458. This court, after noting that the equal protection clause of the Fourteenth Amendment was applicable to corporations, and after referring to and distinguishing the cases which had been cited as holding that a state was free to impose such restrictions as it saw fit upon the right of a foreign corporation to transact business within its borders, said (p. 416):

"It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the

conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

Responding to the argument that the statute might be sustained as a legitimate exercise of the right of classification of the subjects of taxation, the court said (p. 417):

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question, a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state, does violence to the Federal Constitution."

In *Kansas City, etc., Co. v. Stiles*, 242 U. S. 111, the same state of Alabama imposed on corporations, both domestic and foreign, a graduated annual franchise tax approximating from .1 to .001 of 1%, the tax being laid, in the case of domestic corporations, on paid up capital, irrespective of where the corporate assets were located, and, in the case of foreign corporations, upon the actual amount of capital employed within the state. As applied to the plaintiff, the total tax paid was only \$2,434. How much this exceeded the amount which would have been chargeable against a like foreign corporation doing a like business, does not appear. Computation shows, however, that the widest disparity that could exist in the extreme case of a \$10,000,000 domestic corporation, and a like foreign corporation employing no substantial amount of capital within the state, would be \$2,025. This court sustained the tax. In so doing this language was used (p. 118):

"There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them."

We do not interpret this to mean that the indicated difference in the character of the privilege would justify unrestricted difference in treatment. Thus to read it would seem to involve irreconcilable conflict with the *Greene* case, which was distinguished but not disapproved, and which, in other cases, has been recognized as authority for the proposition that

a tax law discriminating against a foreign as compared with a domestic company is invalid where "there was no practical distinction between it and a state corporation doing the same business in the same way."

Flint v. Stone Tracy Co., 220 U. S. 107, 161.

Herndon v. Chi. R. I. & P. Ry. Co., 218 U. S. 135, 158.

Baltic Mining Co. v. Mass., 231 U. S. 68, 87.

We take it rather that the intended meaning of the quoted language was that denial of equal protection would not follow *merely* from the application of different rates of franchise taxation to the two classes; and that there was no purpose to depart from the principles declared in the *Greene* case.

In the *Greene* case, as in the case at bar, there was no attempt to rest the tax on a base common to both foreign and domestic companies, but the tax was applied to foreign companies only (the converse is substantially true here). In the *Stiles* case, on the other hand, the tax was, as to both, rested on capital, and any disparity which might have ensued from the fact that it was the total capital of the domestic and the capital employed within the state of the foreign company which was the base of the tax was rendered inconsequential by the restricted rate common to both. The latter case appears to have been well within the familiar principle that the equality clause does not compel an iron-clad rule of equal taxation.

Bell's Gap R. R. Co. v. Penn., 134 U. S. 232, 237.

- (b) That Wisconsin has in substance domesticated foreign corporations gives added sanction to the proposition that difference in place of organization is not a justifying distinction.

In 1905 there was added to the Wisconsin general foreign corporation law the following provision:

"All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers." (Chap. 434, Laws of 1905; subsec. 10, Sec. 1770b, Wis. Stats.)

Foreign life insurance companies are within the meaning and purpose of this statute. Its language being general and without exception must be given general meaning.

State ex rel. Wis. Trust Co. v. Leuch, 156 Wis. 121, 130.

Barry v. Minahan, 127 Wis. 570, 575.

Moreover, by Chap. 506, of the laws of the same year, when the general foreign corporation section was rewritten and reenacted, there was included, as subsec. 1 thereof, the following:

"For the purposes of this section, the term 'corporation' shall include all corporations, associations, companies, joint stock companies, or express companies organized otherwise than under the laws of this state."

Said subsec. 10, first above quoted, was adopted from Illinois, and with the construction there placed upon it by the courts. Its purpose was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of

like character and bring them all under the influence of the same law."

Thronson v. Universal Mfg. Co., 164 Wis. 44, 49.

Santa Clara Female Academy v. Sullivan, 6 N. E. 183, 186 (Ill.).

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 557, 558.

A similar statute of Colorado, under which a foreign corporation entered the state, was held to place it on a parity with domestic corporations.

American Smelting Co. v. Colorado, 204 U. S. 103, 113.

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 344.

C. I. Ry. Co. v. Ludwig, 156 Fed. 152, 158-160.

Ivy v. W. U. Tel. Co., 165 Fed. 371, 377-378.

In Wisconsin, therefore, no difference in treatment of domestic corporations may be justified by a difference in place of organization or in source of powers or privileges. Foreign corporations are, in substance, domesticated.

5. The difference in the location of reserves for taxing purposes does not justify the difference in treatment.

Thus far we are not in disagreement with the state court. But that court found the justifying difference in the location for taxing purposes of the large reserves of level premium companies. No doubt this was the only ground which could be suggested for the difference in treatment.

The reasoning of the state court was that the difference in *situs* of personal assets and income as be-

tween domestic and foreign companies "suggests, if it does not indeed demand, some substantial difference of treatment in the matter of the amount of the fees exacted." The wide gap between the burdens here resulting was then bridged by the argument that, compared with the results which might have ensued under personal property or income taxation, no such disparity *affirmatively* appeared as would condemn the statute as arbitrarily discriminatory. (Tr. pp. 5, 6, 52.)

This reasoning in substance means that a statute which makes an arbitrary and discriminatory classification may be justified by the assumed equivalency of result which might have been accomplished by some other exercise of the taxing power,—that the propriety of the enacted classification may be tested by supposed results under an imaginary statute. It means that (at least as applied to tax laws) denial of equal protection may be justified by denial of due process,—for there cannot be due process if an otherwise discriminatory law may be justified by a supposed law which, never having been enacted, the party discriminated against can have no opportunity of testing the validity of.

Home Savings Bank v. Des Moines, 205 U. S. 503, 519. (Quoted from at page 77 hereof.)

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664.

Louisville, etc., R. Co. v. Greene, 244 U. S. 522, 553, 554.

In the *Owensboro* case, it is said (p. 683):

"The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax

should be held valid, does not strike us as worthy of serious consideration."

We might agree with the state court that the legislature was confronted with the problem of justly taxing life insurance companies, having large invested reserves differently located as regards their *situs* for taxing purposes. It might be further agreed that it was within legislative discretion whether to solve the problem of taxing these companies by a system of personal property taxation, of income taxation or of license fee taxation. But at this point the judicial inquiry should have been, what did the legislature do,—not what it might have done. What the legislature did was to decide that it would *not* adopt a system of personal property or of income taxation, but *would* adopt the license fee system.

Having done this, it was open to the legislature to have prescribed a standard of license fee taxation, applicable alike to both domestic and foreign companies, which would have had relation to their personal assets or income subject to Wisconsin taxation. It might, for example, have imposed upon both classes, a per cent fee according to the value of personal assets within the taxing jurisdiction, or Wisconsin income might have been made the base of the tax. But this the legislature did not do, or attempt to do. It chose to lay the tax as to domestic and foreign companies alike upon the privilege of transacting the business,—upon the *business* as the state court has repeatedly declared,—and to measure it by a wholly *different standard*, and one *without relation to location or amount of assets or income from year to year subject to the taxing jurisdiction*.

Domestic companies were required to pay 3% of gross investment income and Wisconsin premiums,

and non-resident premiums were exempted; foreign companies, for exercising the identical privilege, and transacting precisely the same business, were required to pay \$300 plus the penalty, *if any*, of being born in a state which dealt less gently with Wisconsin corporations. According to this standard, plaintiff's taxes necessarily go up or down according to its gross returns on investments and from Wisconsin premiums,—regardless of the value of assets from year to year remaining after expenses and liabilities are discharged. The tax of the like foreign company, so far as fixed by the statute, stays at the flat sum of \$300—regardless of amount of fluctuation in assets or income subject to Wisconsin taxation. That this flat sum is subject to change only in the event that the home state of the foreign company taxes Wisconsin companies more than \$300 makes even more remote, if that were possible, the relation between the tax in question and any attempted measure of personal property or income taxation. Obviously there can be no connection between the tax exacted by another state from Wisconsin companies and the amount of the assets or income of the foreign company subject to the taxing jurisdiction of Wisconsin. Wisconsin assets and income of the foreign company, having a *situs* for taxation in Wisconsin, may multiply. Meanwhile, the tax required of Wisconsin companies by the other state, may remain fixed, or, indeed, may be removed.

The statute as in fact adopted by the legislature thus embraces a standard which is not only without relation to, but *excludes*, the standard or measure of personal property or income taxation. It necessarily

follows that the question is whether there is arbitrary selection in the standard in fact adopted, not whether there would have been arbitrary selection under a standard which the legislature excluded. The excluded standard can have no reasonable or just relation to the adopted standard.

Southern Railway Co. v. Greene, 216 U. S. 400, 417.

Had the statute embraced a standard of taxation which pretended to make property or income within the taxing jurisdiction the base of computation (as in the *Stiles* case) we should be able to determine from the law itself and its effect as enforced, whether there was denial of equal protection. But how does the case stand if the results that might be achieved under the excluded base are to be regarded as germane, and the question of equal protection is made to depend (as the state court held) upon the ability of the plaintiff to show that like results could not have been accomplished under some other taxing scheme?

If this burden must be discharged there must be set up an imaginary taxing scheme, say of personal property taxation, which shall go as far as constitutional limitations will permit in accomplishing like disparity of treatment. The question must be determined whether, if this imaginary law were adopted, it would be within the taxing power of the state. This includes the inquiry whether it would be within the provision of the State Constitution that "the rule of taxation shall be uniform" (Sec. 1, Art. VIII); also whether it is in violation of the equality clause of the State Constitution (Sec. 1, Art. I). These latter inquiries involve not merely the question

whether the law is discriminatory as between domestic and foreign companies, but whether discriminatory as between domestic level premium companies and other corporations and owners of personal property. When inquiries like these are satisfied, the facts must be investigated to determine the comparative results of the hypothetical law as enforced. If the result does not justify the real law, the process must be repeated under a hypothetical income tax law, which involves the infinity of questions arising under such a law. This failing, like inquiry must be made under other hypothetical taxing schemes until the maximum of the disparity of treatment otherwise lawfully achievable shall have been exhausted. And when all the questions presented by these phantom laws have been determined, the fact remains that we do not know that the legislature would have adopted any of them if it could. All we know is that it has not done so, but on the contrary and in fact has adopted a law which excludes them.

And so we submit that to justify the arbitrary discrimination which the legislature has written into the taxing scheme now before the court by the assumed equivalency in result of some other and hypothetical law—which the legislature in adopting this law has in effect repudiated—is to deny efficacy to the equality clause as applied to taxation. A state need only to prescribe a standard of license fee taxation *which does not pretend to measure the tax by assets or capital or income subject to the taxing jurisdiction, but upon a wholly arbitrary basis*, and rest content in the knowledge that, no matter how discriminatory the law adopted, the party complaining of it may not be able to show that by some other

exercise of the taxing power like disparity of treatment would have been impossible of achievement.

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there may be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Gulf, Colorado, etc., Ry. Co. v. Ellis, 165 U. S. 150, 154.

6. The retaliatory statute does not justify the classification, or materially modify the discrimination.

The state court found it unnecessary to consider whether the statute in question is aided by the retaliatory provisions of Sec. 51.33, Wis. Stats. (Appendix, p. 132), observing that any effect which they might have would be in the direction of lessening the disparity in treatment. (Tr. fol. 120.)

(a) As to validity of retaliatory tax laws.

Retaliatory tax laws have been sustained, usually against the assault that they constitute an unlawful delegation of legislative power.

Home Ins. Co. v. Swigert, 104 Ill. 653.

Phoenix Ins. Co. v. Welch, 29 Kan. 480.

People v. Fire Ass'n, 92 N. Y. 311.

Largely upon the authority of *Paul v. Virginia* (8 Wall. 168), and upon the ground of state authority to prescribe conditions upon the admission of foreign

corporations, this court has held that the retaliatory law of New York did not offend against the Fourteenth Amendment.

Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 117, 119.

There was a vigorous dissent by Mr. Justice Harlan, and the case was distinguished, if not limited, in *Southern Railway Co. v. Greene* (216 U. S. 400, 415). It seems difficult of reconciliation with other cases which appear to hold that a corporation in fact within the jurisdiction of a state is not to be regarded as having surrendered its right to the equal protection of its laws. See

Ins. Co. v. Morse Co., 20 Wall. 445, 455, 456.

American Co. v. Colorado, 204 U. S. 103, 113.

(b) The retaliatory provisions do not operate to correct or warrant the discrimination.

But laying aside the question of the validity of the retaliatory provisions, it is sufficient here that they do not operate to correct the arbitrary discrimination complained of.

(1) As the statute, with the retaliatory feature, has in fact worked out, plaintiff is taxed about a half million dollars against about \$27,000 paid by all foreign level premium companies combined, the tax of the former amounting to about 17% of its Wisconsin business (measured by Wisconsin premium receipts) and the tax of the latter, with over 50% more business, aggregating but 00.64%. (Tr. pp. 42, 43.) The tax of the New York Life with nearly half as much Wisconsin business, was under \$11,000, or less than 1% of its Wisconsin premiums. To be taxed for the privilege of transacting a business fifty

times as much as another is taxed for transacting the same business is about as arbitrary as though the difference were several times as great.

(2) The question is whether the state of Wisconsin has denied to plaintiff the equal protection of *its* laws. The problematical consequences of laws of other states may not justify inequality of treatment by the laws of Wisconsin. The retaliatory provisions operate, as their reading discloses (p. 132 hereof), not upon foreign companies *as a class*, but only upon those doing business in Wisconsin whose home states exact more than the \$300 from Wisconsin companies doing business there. Whether foreign companies pay Wisconsin more than \$300, and, if so, how much more, is determined, not by a standard which is fixed by, or bears relation to equality of treatment under, the laws of Wisconsin, but upon wholly extrinsic and arbitrary considerations. Thus:

If the home state of other companies exact no more than \$300, the respective tax is 3% and \$300.

On the one hand, the plaintiff is taxed 3%; on the other, the tax of foreign companies transacting the like business in Wisconsin will fluctuate as the taxing standards of their states fluctuate,—an Illinois company may pay in Wisconsin say \$300, an Ohio company perhaps \$600, the largest New York company \$11,000, the latter figure marking the maximum thus far exacted from any foreign company.

If the home state of other companies exacts more than \$300 from Wisconsin companies, the disparity of treatment under the Wisconsin law is lessened in degree (comparatively slight, as before noted), but the degree is measured by what the other state does,

and bears no relation to just or equal treatment by the laws of Wisconsin. Wisconsin abdicates the duty of affording equal protection to its own companies as compared with foreign companies. To plaintiff it says: You pay according to an arbitrary standard having no relation to Wisconsin business or taxable assets or income; to the foreign company it says, you pay \$300; to the protest of its own companies it responds, this is as near equal protection of the laws of Wisconsin chooses to accord you, but there is a chance that the disparity may be removed, in *some* degree (inconsequential, as the event has shown), providing other states shall happen to deal more harshly with you than their companies are dealt with by Wisconsin.

Tax burdens imposed by the laws of another state may not defeat otherwise legitimate classification.

Kidd v. Alabama, 188 U. S. 730, 732.

By the same token they should not be permitted to uphold otherwise unlawful classification.

(3) Looked at from the inadmissible angle (considering that equal protection must be accorded by the laws of Wisconsin) of composite result, the utmost effect of the retaliatory provision is to prevent the disparity of tax treatment from becoming greater. Similar retaliatory laws exist in all the states having companies transacting business in Wisconsin. (Tr. fol. 176.) In this situation, plaintiff pays Wisconsin the 3% tax, and foreign companies the \$300, or such additional amount, if any, as their home states exact from Wisconsin companies. Plaintiff pays the equivalent of the latter item to these states. The disparity between the gross amount paid by the plain-

tiff and that paid by the foreign companies remains, therefore, the difference between the 3% and \$300.

(c) Nor do the retaliatory laws of other states justify discrimination by Wisconsin.

As to the contention of the state that the disparity of treatment may be justified by the fact that if foreign companies were taxed more, domestic companies, in virtue of the retaliatory laws of other states, would be subjected by them to more onerous tax burdens, it is sufficient to say:

Obviously this presents no difference in situation as between domestic and foreign companies which is germane or has relation to the classification in question. As the complaint avers, there are domestic level premium companies which do not transact business in states having companies which transact business in Wisconsin. These domestic companies, therefore, are not subject to the retaliatory laws of other states, and receive no benefit whatever from the fact that the companies of those states are only nominally taxed in Wisconsin. The suggested ground for the nominal taxation of foreign companies thus wholly fails of application as to domestic companies which do not transact business in other states.

The same situation prevails as to any domestic level premium company, as for example, the plaintiff, which may withdraw from another state represented by companies in Wisconsin. The retaliatory laws of the other state cease to have application to the Wisconsin company thus withdrawing, and it ceases to obtain any compensating advantage from the nominal and disproportionate tax imposed by Wisconsin upon the companies of the other state.

A ground for difference in treatment which thus applies to some but not to others *of the same class*, and which, as to those *within the same class*, may be applicable today and cease to be applicable tomorrow, cannot be germane or have reasonable relation to the classification in question. To justify the classification upon such a ground for difference in treatment, would make the classification good as to some companies within the class, and bad as to others—would make the classification a legal one as to plaintiff operating in another state today, and would make the same classification an illegal one if it withdrew therefrom tomorrow.

“But while classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification.”

Black v. State, 113 Wis. 205, 221.

To attempt to make assumed protection of domestic companies from higher taxes abroad the excuse for the nominal and disproportionate taxation of foreign companies by Wisconsin, serves merely to emphasize the arbitrariness of the classification, and its utter disregard of all those considerations of relative business, assets or income which mark legitimate classification for taxing purposes.

What plaintiff contends for is equal protection by the laws of Wisconsin. A so-called state policy of solicitude as to the burdens other states may impose is no ground for discrimination by Wisconsin. If that state will tax both domestic and foreign companies by a standard which shall have some reasonable relation to proportionate business, assets or income subject to

state taxation, rather than by the present wholly arbitrary standard, there need be no concern as to the burdens imposed on Wisconsin companies by other states. This is what the State Tax Commission, after full investigation, has repeatedly urged the Wisconsin legislature to do. (Tr. fol. 191.)

7. The law makes plaintiff the subject of a taxing scheme unique in legislative history, and arbitrarily imposing burdens grossly disproportionate to those which would result from any other recognized system of taxation.

(a) History of the statute in question.

That in the imposition of the present tax the plaintiff company was chiefly in the legislative mind is indicated by the fact that it is the one large life insurance company of the state (as, indeed, it is one of the large companies of the country), its outstanding policies amounting to over one hundred times the aggregate amount of those of all other Wisconsin level premium companies combined. (Tr. p. 42.)

For several years preceding the enactment of the present statute, life insurance companies had been the subject of numerous license fee laws. Prior to 1899, domestic level premium companies for many years had been taxed at \$300 plus 2% of Wisconsin premium receipts, while foreign companies had been taxed at \$300 or such additional amount, if any, as resulted from the operation of the retaliatory statute which had been adopted in 1870.

By Chap. 326, Laws of 1899, known as the Orton law, the license fee rate exacted of domestic level premium companies was reduced to 1%, but, for the

first time, was laid on the gross income of domestic companies from all sources except rents of real estate and interest on United States bonds. By this law foreign companies of the like kind were taxed 1% of Wisconsin premium receipts. It is obvious that this law resulted in a large increase in the license fee exacted of plaintiff, and, moreover, to subject plaintiff, in virtue of the retaliatory laws of other states, to a double tax on its non-resident premium receipts. This law, though grossly burdensome as to plaintiff, made some pretense at the exaction from foreign companies of a substantial tax for the privilege of transacting the like business.

The succeeding legislature amended the Orton law so as to give it substantially the form of the present law. (Chap. 21, Laws of 1901.) Thereby plaintiff was relieved from the double taxation on its non-resident premium receipts, but (apparently that there might be no decrease in the large revenue collected from domestic and foreign companies under the Orton law), it was, at the same time, subjected to a tripling of the rate upon its large investment income and Wisconsin premiums.

The legislature of 1905, seemingly impressed with the discrimination between domestic and foreign companies effected by the law of 1901, and perhaps with the thought in some degree to correct it, amended the Act of 1901 by raising the tax upon foreign companies from \$300 (or the greater amount, if any, resulting from the retaliatory provision) to 3% upon all premium receipts from Wisconsin business. (Chap. 455, Laws of 1905.) In virtue of the retaliatory laws of other states, this would have operated, as had the Orton law, to subject the plaintiff to

double taxation on its non-resident premium receipts. At the next legislative session, and before the Act of 1905 became effective, the provisions of the Act of 1901 were restored, and ever since have been in force (Chap. 656, Laws of 1907, being Sec. 51.32, Wis. Stats.).

It is plain from this legislative history that when the radical departure from the previous basis of taxation was initiated in 1899, the legislature, though seeking to largely increase the taxation of level premium companies, nevertheless entertained some measure of regard for equality of treatment as between domestic and foreign companies. Having tasted the fruits of the Orton law (a very substantial part of which came from foreign companies), it was, however, unwilling to surrender any part of them. It was willing to relieve domestic companies from double taxation elsewhere, but only on condition that there be no loss of revenue. The sense of equality which, in a measure, was reflected in the original Orton law by the taxation of the Wisconsin premium receipts of foreign companies at the same rate as plaintiff's income was taxed, was, therefore (after some flickering of legislative conscience), abandoned, and the present wholly arbitrary standard settled upon.

Though not directly material here, it may be added that the legislature in 1915 supplemented the retaliatory law so as to make the tax paid by a foreign company in Wisconsin wholly dependent on the tax exacted by its home state from Wisconsin companies—thus eliminating the \$300 minimum, and rendering the standard more arbitrary than before. (Sec. 51.331, Wis. Stats.) And by subsequent enactment, adopted the same year, Wisconsin premiums of

domestic companies were exempted from the base of the 3% tax—thus leaving as the sole base the investment income, almost entirely interstate, and removing the only element in the law which (as later noted) characterizes license fee taxation by Wisconsin of other insurance corporations. (Sec. 51.32, Wis. Stats., 1915.)

(b) Condemnation of the tax by State Tax Commission:

As early as 1901, and pending the above mentioned legislation, this state commission announced its disapproval of the principle of the law in question. In 1909, the commission was directed by the legislature to make a thorough and complete investigation of the subject of taxing life insurance companies. That the commission recognized and sought to correct the arbitrary discrimination resulting from the law, is evidenced by its report, made in 1911, recommending the passage of a bill imposing on life insurance companies a license fee of 5% on the Wisconsin proportion of investment income of all level premium companies transacting business within the state, the proportion to be measured by the ratio of Wisconsin insurance to total insurance. Such a bill was presented both to the legislature in 1911 and again in 1913, but failed of passage. Had the recommendations of the Commission been followed, plaintiff's annual taxes would have been only about one-quarter of the amount exacted under the present statute. (Tr. fols. 190-192.)

(c) The statute is unique in insurance taxation, and manifests arbitrary selection.

As before noted, the statute afford the only example in any state of a tax upon the *gross* investment

of life insurance companies. (Tr. fol. 189.) As to other kinds of insurance companies (as well as numerous other corporations formerly taxed on the license fee basis), Wisconsin makes no distinction in the rate or standard of taxation as between domestic and foreign companies. (Tr. fols. 185, 186.) And, moreover, the statute embodies Wisconsin's sole venture in the license fee taxation of earnings or receipts derived from without the state, whether of insurance or other corporations. (Tr. fol. 186.)

There would seem to be nothing about a stable and well managed mutual life insurance company to warrant making it an outlaw in the field of insurance taxation. Such companies are usually regarded as agencies which tend for thrift, for maintenance and stability of credit, for protection from want, and, not infrequently, for the relief of the public from the support of the destitute. Certainly companies engaged in other fields of insurance, can lay claim to no greater virtues. The unique and arbitrary character of the Wisconsin idea, exemplified in the law in question, is strikingly indicated by comparison of the amount exacted from plaintiff with the amount which would have been imposed had it been engaged in any other kind of insurance activity. Were plaintiff a fire, navigation, casualty, suretyship or title guaranty company, its tax would be 2% of its Wisconsin premium receipts, or \$56,730,—as against \$482,193. (Tr. fol. 186.) Were it a life insurance company doing business on the stipulated premium or assessment plan, it would pay but \$300. And, being already a mutual company, the addition of a lodge organization and ritual, would give it the statutory characteristics of a fraternal company and exempt it from tax altogether.

Indeed, the statute evidences arbitrary selection on its face.

No ground has been suggested for justifying a difference in treatment between foreign and domestic level premium companies that is not equally a ground for difference of treatment as between foreign and domestic assessment companies (by this law taxed *alike* at \$300), or as between foreign and domestic stipulated premium companies (taxed *alike* at \$300), or as between foreign and domestic fraternal (*alike* exempted by the statute).

There would seem no escape from the conclusion that the statute is either arbitrary as to level premium companies or arbitrary as to assessment, stipulated premium and fraternal companies. In its enactment there was apparently absent from the legislative mind any thought of resting the difference in treatment of foreign and domestic level premium companies upon any rational distinction having relation to the object of the law, or upon any consideration having relation to their respective duties as tax payers.

American Sugar Refining Co. v. Louisiana,
179 U. S. 89, 92.

- (d) **The statute imposes tax burdens wholly disproportionate to those which would have resulted from any recognized system of taxation.**

As before pointed out, the statute is not framed with relation to, but, on the contrary, arbitrarily excludes, any standard of personal assets or net income as the basis of the tax.

In view of the fact, however, that the state court (erroneously, as we contend) treated these excluded

standards not only as material to but as justifying the classification, it may not be out of place, as briefly as may be, to consider them.

Life insurance companies, domestic or foreign, never having been taxed by these standards, the extent of the burden which would have ensued thereunder is necessarily problematical. There can be no guide except analogy to the standards as they have in fact been applied, and the constitutional limitations under which they are required to be applied.

(1) *Personal property taxation.*

The personal assets of the plaintiff consist almost entirely of credits,—notes, mortgages, bonds, policy loans, premium notes, etc. Prior to 1911, when the attempt to tax this sort of property was abandoned, and an income tax system substituted (Tr. fol. 283), the Wisconsin statutes provided for taxing as personal property, debts due or to become due, whether on account, note, contract, bond, mortgage or other security (Sec. 1036, Wis. Stats.; Appendix, p. 140), but exempted “so much of the debts due or to become due to any person as shall equal the amount of bona fide and unconditional debts by him owing.” (Subsec. 10, Sec. 1038, Wis. Stats.; Appendix, p. 140.)

The gross personal assets of plaintiff on Dec. 31, 1911, were \$283,468,970. Deducting its liabilities of \$279,508,086 (including \$252,924,714 of reserve liabilities), the tax paid by plaintiff amounted to over 12% of net personal assets of \$3,960,884,—a rate over ten times the average rate of direct taxation as determined for the year by the state tax commis-

sion. (Tr. fols. 187, 188. Rep't Tax Com., 1914, p. 16.)

But the state court observed that "it seems entirely clear that the liability to policyholders * * * is not in any sense an 'unconditional debt' " and that "the policy of the state has never extended the exemption to any liability short of an unconditional debt." (Tr. fol. 283.)

This was quite beside the question. The policy of the state has never been to tax insurance companies on a personal property basis at all. Whether if it were to so tax them, the state would exempt reserve liabilities is, therefore, a question with which it has not dealt. That constitutional limitations would leave it no other alternative but to make the exemption, is quite plain, as we shall show.

The statutes of the state provide that no company shall transact business in the state unless "the commissioner is satisfied that its assets are properly and safely secured and exceed its liabilities, *valuing its policies as provided by the laws of this state.*" (Sec. 1948, Wis. Stats.; Appendix, p. 134.)

Also that every such company "* * * shall hold funds properly and safely secured to provide for its reserve liability over and above all its other liabilities, which reserve liability shall be determined by the state" according to the value of the policy, which, in turn, is determined by statutory standards of mortality and interest. (Subsec. 1, Sec. 1950; Appendix, p. 137.)

Mutual companies may make distribution of surplus funds which may have accumulated, but:

"* * * there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, * * *." (Sec. 1952.)

The complaint avers that, pursuant to these laws, plaintiff has accumulated and holds invested funds (to amount of \$252,924,714) to provide for this reserve liability. (Tr. fol. 188.) Not only do plaintiff's policy contracts oblige it to pay on request the reserve or surrender value, but, in many of the states where it transacts business, "laws exist which require the advancement by the plaintiff of a certain percentage, usually upwards of 90%, of the reserve creditable to any policy, to the holder of such policy upon request." (Tr. fols. 169, 188.) That the reserve is an obligation or debt is recognized by the Federal Income Tax laws, hereinafter noted, which authorize additions thereto to be deducted in arriving at taxable income.

It is thus seen that the amount of the reserve liability at any time existing measures a fixed and certain obligation to the policyholder at that time. This liability increases as the value of the policy increases, but at all times it represents a definite obligation. The liability has been judicially defined as being the present value of the aggregate policy liabilities of the company.

Bankers' Life Ins. Co. v. Howland, 73 Vt. 1; 57 L. R. A. 374, 375.

New Haven Trust Co. v. Gaffney, 47 Atl. 760, 761.

Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199, 213-214; affirmed, 201 Fed. 918; *certiorari* denied, 231 U. S. 755.

Insurance Company of North America v. M'Coach, 218 Fed. 905, 907.

The company occupies the relation of debtor to the policyholder.

Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 431.

Timlin v. Equitable Life Co., 141 Wis. 276, 284.

That the obligation must be met is as certain as death is certain. Nor does death alone mark the time of maturity. Upwards of 90% of the liability is payable on demand and surrender of the policy. (Tr. fols. 169, 188.) In the absence of prior call and payment, the liability is payable at prescribed periods or upon death, and must then be discharged in full. It is as much an absolute debt and one as certain to nature as a note payable on demand, or payable on a prescribed date.

Whether these reserve liabilities are "unconditional debts" *within the meaning of said Sec. 1038*, was not (as the state court assumed), the material question. That statute has never been applicable to insurance companies at all. The material question was whether, were the state to tax the credits of insurance companies, they could be taxed by a different standard than that applied to others. This question the state court did not pass upon.

The provision of the state Constitution that "the rule of taxation shall be uniform" (Sec. 1, Art. VIII) is not limited to the mere rate of taxation, but requires the uniform taxation of all personal property except only as there may be absolute exemption based upon a legal classification which recognizes equality before the law.

To tax insurance companies on their gross credits, and others on their net credits, would be to apply different rules of taxation to the like kind of prop-

erty. It would establish two classes, neither of which is exempted, but one of which is taxed by one rule and the other by another rule. The Constitution permits but one.

C. & N. W. Ry. Co. v. State, 128 Wis. 553, 603, 604.

Black v. State, 113 Wis. 205, 221.

Lawrence University v. Outagamie County, 150 Wis. 244, 249.

State ex rel. Owen v. Donald, 161 Wis. 188.

"For the direct method of taxing property, taxation on property so called, as to the rule of uniformity, there can be but one constitutional class. All not included therein must be absolutely exempt from such taxation. All within such class must be taxed on a basis of equality so far as practicable."

C. & N. W. Ry. Co. v. State, 128 Wis. 603, 604.

Moreover, the difference, if any, between "unconditional debts" of others and the current obligations of an insurance company to its policyholders for the surrender value of their policies is plainly one of form and not of substance.

Lawrence University v. Outagamie County, 150 Wis. 244.

Ruggles v. Fond du Lac, 53 Wis. 436.

People v. Weaver, 100 U. S. 539.

Pelton v. National Bank, 101 U. S. 143, 153.

Evansville Nat. Bank v. Britton, 8 Fed. 867.

It follows, therefore, that the constitutional application to life insurance companies of the former Wisconsin system of taxing securities and credits would necessarily involve deduction for reserve liabilities. The result is that the present tax exacted from plain-

tiff is about ten times what it would have been under the personal property system.

It is worthy of note, moreover, that in the practical administration of the former system of taxing credits they were never reached to anything like their face or true value. Wisconsin did not escape the usual experience in this regard. This fact no doubt prompted the adoption in 1903 of the so-called mortgage taxation law. This law provided for the separate assessment and taxation of the interest of mortgagee and mortgagor, and the payment by the former of the tax on the mortgage. (Secs. 2 and 3, Chap. 378, Laws of 1903; Appendix, pp. 137, 138.) The presence in the law of provisions authorizing the parties to covenant that both interests should be assessed together against the mortgagor, rendered it futile of its purpose. Its only effect was to convert the partial exemption of mortgage credits which had theretofore rested on impracticability of administration into their total exemption by statutory sanction.

Though it were conceded, contrary to the fact, that the tax imposed by the law here in question were, as applied to plaintiff, a fair equivalent of the personal property standard, there remains the question of the result of that standard as applied to foreign companies.

A person may not be subjected to arbitrary discrimination in a tax law even though it imposes no unconscionable burden upon him.

As to how a personal property tax laid against foreign companies would compare with the nominal tax now exacted, we cannot know. The facts as regards their assets within the taxing jurisdiction were not available and are not pleaded. It does

appear, however, that foreign level premium companies had outstanding in Wisconsin at the end of 1911 policies to the amount of \$148,364,146, and collected in Wisconsin during the year \$4,327,557 in premiums. (Tr. p. 42.)

It is fair to assume that arising from the transaction of this vast business in Wisconsin, there accrues to foreign companies a large amount of premium notes or other forms of credits. These are subject to the taxing jurisdiction of the state.

Liverpool, etc., Ins. Co. v. Orleans Assessors,
221 U. S. 346, 354, 355.

Metropolitan Life Ins. Co. v. City of New Orleans,
205 U. S. 395.

Orleans Parish v. New York Life, 216 U. S. 517.

So, it is competent to tax foreign companies upon their mortgage interests in Wisconsin lands, making the situs for such mortgage taxation the situs of the real estate mortgaged.

Savings, etc., Co. v. Multnomah, 169 U. S. 421.

State ex rel. Manitowoc Gas Co. v. Tax Commission,
161 Wis. 111, 116.

Were plaintiff subjected to a tax on its personal assets, including credits and mortgage interests, uniformity and equality would require taxation by a like standard of the like property of foreign companies within the taxing jurisdiction. To what extent the tax burdens of the latter would be thereby increased is necessarily a matter of inference. The magnitude of the business transacted within the state points a much greater tax than the license fee now collected.

(2) Income taxation.

The state income tax law became effective January 1, 1911, before the license fees here in question were exacted. If equivalency of result under other systems of taxation may be material at all, the results which would obtain under the existing income tax system rather than those which would obtain under the discarded personal property system, would seem entitled to the greater relevancy.

Here again the difficulty is encountered that the income tax law expressly excludes from its operation incomes of insurance companies, as well as of such somewhat analogous companies as banks, trust companies, and building and loan companies which deal largely in credits. (Tr. fol. 189). By analogy only, therefore, may equivalency of result under an income tax law be considered.

The essential features of the Wisconsin income tax law, so far as here applicable, are that:

(1) It lays a tax only on net income, and not upon gross income or capital.

(2) It specifically allows deduction from gross income of expenses incurred and losses sustained in carrying on the business. (Secs. 1087m—1, 2, 3.)

(3) The maximum rate applicable to the net income of corporations has never exceeded 6%. (Sec. 1087m—6.)

Not being applicable to insurance companies, the law contains no provision as to the specific items of inclusion or exclusion which enter into the calculation of net income of a life insurance company. For this analogy recourse must be had to the jurisdictions which have taxed life insurance companies on that basis. These include the federal government, and (recently) the state of West Virginia. Beginning

with the Corporation Excise Tax Law of 1909, and in all the intervening federal income tax laws, including the War Income and the War Excess Profits Tax Acts of October 3, 1917, the government has determined the net taxable income of this class of corporations, substantially as follows:

From gross income, not including returned, abated, or credited back premiums, is deducted expenses and losses, including payments within the year on policy and annuity contracts, and the net additions required by law to be made within the year to reserve funds, but not including general dividends distributable as profits.

Act of Aug. 5, 1909, Sec. 38, Par. 1 and 2
(Fed. Stats. Ann., 1909 Supp., pp. 829, 830).

Act of Oct. 3, 1913, Sub. G, Par. a and b
(Fed. Stats. Ann., 1914 Supp., p. 191).

Act of Sept. 8, 1916, Sec. 12, (a) and (b), (Fed.
Stats. Ann., Supp. Oct., 1916, pp. 88-90).

War Income Tax Act of Oct. 3, 1917, Title I,
Sec. 4 (Fed. Stats. Ann., Supp. Oct., 1917,
pp. 38, 39).

War Excess Profits Tax Act of Oct. 3, 1917,
Title II, Sec. 206 (Fed. Stats. Ann., Oct.,
1917, Supp., p. 42).

The like method of determining net income is adopted by West Virginia (Acts 1915, Chap. 3, Second Extra Ses.)

The "dividends" which are denied deduction are merely general dividends from *profits*, and (plaintiff being a mutual company) are not material here.

Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199. Affirmed 201 Fed., 918. Petition for *certiorari* denied 231 U. S. 755.

Conn. General Life Ins. Co. v. Eaton, 218 Fed. 188.
Conn. General Life Ins. Co. v. Eaton, 218 Fed.
206, 222. Affirmed 223 Fed. 1022.

The method of determining net income prescribed by these laws merely recognizes the obvious fact that the net income of a life insurance company is not represented by its gross investment income and premiums collected less merely the expenses of carrying on the business. The difference in no sense represents net income or profits. If a thousand persons were to pay to a bank \$1,000 each under contracts by which, on the happening of a series of events, the bank was to refund it with its interest increments, and meanwhile to pay the present worth on request, no one would maintain that the bank had made a net income of a million dollars. Tax laws have, therefore, uniformly measured the net income of life insurance companies by determining for the taxable year the net increase of resources over liabilities. The former are increased by the gross income for the year. This increase is partially offset by the expenses and losses incurred and paid and the addition to reserve liability which has accrued during the year. The difference is the net increase in resources, or net income.

This measure of net income is in harmony with the general principles of the Wisconsin Income Tax Act above noted—that income and not capital shall be taxed and that deduction shall be allowed for expenses and losses. To assume that Wisconsin would not allow deductions at least to the extent allowed by the Federal acts, would not only conflict with the theory of its own statutes (including those which value policies, treat the value as a liability, and require the setting up of a fund adequate at all times to meet it),

but would be inconsistent with the repeated decisions of the Wisconsin court that it is net *profits* which are the subject of taxation in that state.

State ex rel. Bundy v. Nygaard, 163 Wis. 307.

Income Tax Cases, 148 Wis. 456, 513.

State ex rel. Manitowoc Gas Co. v. Tax Commission, 161 Wis. 111, 116.

U. S. Glue Co. v. Oak Creek, 161 Wis. 211, 221.

The complaint avers that under the Corporation Excise Act of 1909, the tax of plaintiff at the 1% rate for each of the years 1911 and 1912 was under \$32,000. (Tr. fol. 190.) To get the present Wisconsin exaction of near \$500,000 annually, means multiplying the 1% rate by over $15\frac{1}{2}$ —which is more than $2\frac{1}{2}$ times the maximum rate which Wisconsin has ever imposed under an income tax law.

The foregoing assumes that the state would include in the calculation all gross income wherever derived, whereas, as to income other than that of a resident from notes, bonds, stocks, etc., it is the policy of the state (as it is of the Government), to tax only that part which is derived from business transacted and property located within its borders. (See Sec. 1087m—2, Wis. Stats.; Appendix, p. 138.)

State ex rel. Arpin v. Eberhardt, 158 Wis. 20.

U. S. Glue Co. v. Oak Creek, 161 Wis. 211, 218.

The policy manifested by the latter section not only emphasizes and makes more startling the difference between the burden which the law in question imposes on plaintiff and any which might have ensued from the application of the income tax standard, but it is also indicative of the enhanced burden (over the present tax) which would be laid on foreign

companies were they likewise subjected to a tax on the proportion of their net incomes derived from business transacted and property located within the state.

(3) Summary as to the assumed equivalency of result under other forms of taxation.

As nearly as may be determined by analogy:

(1) The state is exacting from the plaintiff, under the license fee law in question, about ten times the tax which would obtain under the constitutional application of the former standard of personal property taxation.

(2) It is exacting from the plaintiff a tax which is presumptively two and one-half times as great as the *maximum* which would have ensued from the application of the income tax system, even though it be assumed, contrary to the policy of the income tax act, that premiums from without the state are considered in the determination of income.

(3) Under either of the above systems, the tax of the foreign companies presumptively would be far more than under the law in question, and the disparity of treatment much less.

(4) Looked at from the viewpoint of a privilege tax, and measuring the relative burden according to Wisconsin premiums collected (which reflects in general the relative use of the privilege), the consideration which plaintiff pays for exercising the privilege is about eighteen times the amount paid by all foreign companies combined for the exercise of the like privilege, and this though they transact nearly ten times the amount of business. (Tr. p. 42.) Nor is the privilege granted plaintiff any broader than that granted the foreign company. It no more confers

authority on the one than on the other to transact business beyond the borders of the state.

8. The cases on which the state court sanctioned the classification, and others relied on by the state below.

Those referred to by the state court as approving the principle of the classification were:

Pacific Express Co. v. Seibert, 142 U. S. 339.

Kidd v. Alabama, 188 U. S. 730.

Brown-Forman Co. v. Kentucky, 217 U. S. 563.

Attention is invited to the fact that in the *Seibert* case the question really was (as more fully appears from the opinion of Judge Caldwell below, which this court approved) whether express companies could be differentiated from railroad and navigation companies, and the former subjected to a license fee tax while the latter were left to be taxed by other methods. The inherent difference in character of business there found to exist is absent here. No situation was presented of a law which, in lieu of other taxes, laid a heavy burden upon one class and practically exempted another class engaged in the *like* business.

Kidd v. Alabama justified taxing the stock of foreign corporations, while not taxing that of domestic corporations or of foreign corporations doing business in the state, upon the ground that as to the former class the corporate property could not be reached for taxation except through taxation of the stock, while as to the latter class taxation could be, and in fact was, effected directly against the corporation or its property. It might well be relevant in determining the propriety of tax classification that

the legislature was *without power* to otherwise tax the alleged favored class or that taxation of such class had been effected by some other lawful tax.

Like considerations differentiate *Brown-Forman Co. v. Kentucky*. One ground upon which the classification was rested went to differences in the character of the business, and the other to the lack of state *power* to tax the alleged favored class,—considerations absent here.

Cases wherein differences in procedure have been sanctioned, notwithstanding difference in residence, or where the difference is in method of imposition, no great disproportion resulting, are of even more remote application.

Field v. Barber Asphalt Co., 194 U. S. 618.

District of Columbia v. Brook, 214 U. S. 138, 152.

Travelers Ins. Co. v. Conn., 185 U. S. 364, 369.

As also are cases where the classification is between individuals and corporations, with their wholly different privileges and advantages.

Flint v. Stone-Tracy Co., 220 U. S. 108, 161, 162.

Income Tax Cases, 148 Wis. 456.

IV

THE STATUTE DENIES EQUAL PROTECTION IN THAT IT ARBITRARILY DISCRIMINATES BETWEEN PLAINTIFF AND FRATERNAL INSURANCE SOCIETIES.

Fraternal associations, both domestic and foreign, with lodge organizations, are wholly exempted; lacking lodge organization, both are taxed at \$300. Plaintiff is taxed about \$500,000.

1. Both are purely mutual associations.

Plaintiff is a purely mutual company. Assessment companies organized under the laws of Wisconsin and elsewhere are likewise purely mutual. Mutual insurance, be it fire, life, or any other kind, is insurance *at cost*. If it is not, it ceases to be mutual. There is no capital stock, no stockholders, and no profits in such an institution, because such business is not carried on for gain, but for the purpose of distributing individual losses among a collection of individuals. The difference between the fraternal and the level premium mutual consists in this: The level premium company aims to so adjust its rates that the insured will pay substantially the same amount of premium each year during the premium paying period of his policy, while the fraternal exacts the actual cost from year to year, or else exacts a sum in excess of cost, but not so large an excess during the earlier years as does the level premium company. One class of fraternal exacts yearly what would be the equivalent of term insurance in a level premium company. Such rates increase with age because of the increase in death

rate. Many, if not the majority, of the fraternal have broken away from this method of doing business because at advanced ages the cost is prohibitory. For the most part the remaining fraternal adopt a middle ground between the natural premium fraternal and the mutual level premium companies. They charge a sum in excess of cost during the earlier years so as to build up a reserve and enable them to charge less than cost as their certificate holder grows old. The level premium company can not advance its rates, so in fixing them it must provide a margin of safety against future contingencies, and its established rates are, therefore, in excess of normal requirements. This excess is refunded to the policyholder, generally speaking, each year, in the way of dividends. Dividends are a return of excess premiums and nothing else.

Mutual Benefit v. Herold, 198 Fed. 199; 201 Fed. 918.

Connecticut General v. Eaton, 218 Fed. 188; 223 Fed. 1022.

N. W. Mut. Life Ins. Co. v. Fink (Eastern District of Wisconsin, not yet reported).

Commonwealth v. Penn. Mutual L. I. Co., 97 Atl. 677.

Commonwealth v. Metropolitan, 98 Atl., 1072.

Mutual Benefit v. Commonwealth, 107 S. W. 802.

New York Life v. Chaves, 153 Pac. 303.

The fraternal operating on a reserve basis can increase its assessments from time to time to meet unusual contingencies so that there is no necessity for it to fix as large a premium in the first instance as does the level premium company. In the final

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analysis, each company aims to carry insurance at cost and whatever difference there is between them is due to the different methods employed in determining what cost should be. The fraternalists are gradually coming to the point where the initial assessments will be made large enough so that it will not be necessary to increase them with age, except to meet unusual happenings.

It may hardly be claimed that the fact that one company makes a pro rata distribution of aggregate cost over the premium paying period, while another meets cost by increasing premium payments with age, is in itself any distinction that is at all germane to the question of legitimate classification.

2. The lodge or social side of fraternal insurance does not justify difference in treatment.

It was principally upon this asserted difference that the state court sanctioned the classification. (Tr. fol. 121). Correctly enough, the court declared:

"Individual cases near the border line on either side often present no differences worthy of notice but this does not invalidate the classification. It is the class, considered broadly as a class which must possess the substantial differences suggesting the propriety of different legislative treatment, not every individual of the class." (Tr. fol. 121).

Herein was recognized that the real question was:

"Whether there is a 'distinction between the classes as classes, whether there are characteristics which in a greater degree, *persist* through the one class than in the other, which justify legal discrimination between them.'"

Borgnis v. Falk Co., 147 Wis. 327, 356.

State v. Evans, 130 Wis. 381.

In the application of these principles, however, the state court misconceived the facts pleaded. It treated the lodge and social feature as the dominating and pervading characteristic, whereas the facts showed the contrary. The complaint avers:

"That the essential and predominant feature of all * * * is the same, being the payment of a definite sum to a designated party or beneficiary on the death of the person whose life is insured; that the presence or absence of social, charitable, benevolent or lodge features in the organization, or the particular plan or method of organization, * * * is not a distinguishing feature in the life insurance business * * *." (Tr. fol. 184).

This averment of the predominating characteristics of fraternalism is one of fact, admitted by the demurrer. As to its truth, figures speak louder than words. References to Tables II, IV, and VI (Tr. pp. 42, 44, 46, and see folios 180, 182, 183), disclose the following facts:

Transacting business in Wisconsin in 1911	Total insurance in force Dec. 31, 1911	Total in force in Wisconsin Dec. 31, 1911
All level premium companies both foreign and domestic.....	\$9,017,799,430	\$242,389,209
All fraternal associations (64).....	6,806,826,646	332,123,883
Ten largest fraternal.....	4,909,210,864	182,561,232
Modern Woodmen.....	1,863,194,000	105,213,000
Plaintiff.....	1,147,273,523	85,149,148
All other domestic level premium companies.....	9,490,761	8,875,915
All Wisconsin fraternal (19).....	166,436,093	85,982,754
Three largest Wisconsin fraternal.....	68,808,000	54,506,100

These figures demonstrate the fact, of common knowledge, that the principal, if not the only, business of fraternal insurance societies is life insurance.

It is for this purpose they are formed and for this they exist. It is this activity that induces people to join them and it is to carry out this object that millions of dollars are paid in premiums or assessments every year. The members may be more sociable, but no one wants to tax them on this account. If the plaintiff should devise a "grip" and "pass-word" and send them out to their policyholders so that they could recognize each other by mysterious manifestations, and suggest that they get together and fraternize and hold meetings, no one would claim that it could thus bring itself outside the pale of the statute in question, and still we apprehend that it would be about as fraternal an organization as those which dominate and characterize the fraternal field. The business of these organizations is insurance, and fraternity is a mere incident.

The fraternal society is subject to regulatory laws in most of the states. (See Tr. fol. 184.) It creates reserves, issues endowment insurance, pays surrender values, subjects its members to medical examinations before admittance, suspends members for non-payment of dues, pays commissions for securing members, maintains home offices with a paid staff of employees, invests its surplus funds, permits the naming of beneficiaries who are not related to the insured nor dependent on him for support, and in fact conducts its business in the same manner that the old line mutual life company does, except that it does not usually build up so large a reserve. It is true that not all fraternal do all of the things enumerated, but it is true that all of them may do them, and that some of them in fact do these very things.

Insurance is the prime consideration with the

members, fraternity a secondary and incidental one. Perhaps it would be no exaggeration to say that not one-half of the members of these organizations see the inside of a lodge room more than once a year, but they pay their premiums or assessments as called for, because they do not want to lose their insurance.

The multiplication of these societies is due to the fact that they are insurance societies. If fraternity were the thing sought, one-tenth of the organizations now in existence would furnish a superfluity of it. Only a limited amount of insurance is carried on any one life by the fraternal, but, by reason of the large number of such societies, the individual is able to carry all the insurance he desires in this class of companies.

The forerunners of fraternal benefit societies in the United States were the "Friendly Societies" of Great Britain. This was defined by Parliament in 1819 (59 Geo. III, ch. 128) as "an institution whereby it is intended to provide by *contribution on the principle of mutual insurance* for the maintenance or assistance of the contributors thereof, their wives and children, in sickness, infancy, advanced age, widowhood or any other natural state or contingency whereof the occurrence is susceptible of calculation by any average."

The modern fraternal benefit society came into existence in America in 1868 when The Ancient Order of United Workmen was formed. As long ago as 1885, since which time the fraternal have become vastly more akin to old line companies, the Iowa court, speaking of the United Workmen, said:

"We are satisfied, from an examination of the record, that the primary object and purpose of the Association of the Ancient Order of United

Workmen is to provide a beneficiary fund to be paid upon the death of each member, *and that the avowed fraternal character of the association is merely incidental thereto.*"

State v. Miller, 66 Iowa 26; 23 N. W. 241, 244.

And see:

Bruce v. Connecticut Mut. Co., 74 Minn. 310; 77 N. W. 210.

Morse v. Modern Woodmen, 164 N. W. 829 (Wis.).

Alden v. Maccabees, 178 N. Y. 535.

Kemp v. Good Templars, 19 N. Y. S. 435.

State v. Arlington, 157 N. C. 640; 73 S. E. 122.

1 Bacon, Ben. Soc., Secs. 52, 146.

2 Bacon, Ben. Soc., Sec. 350.

Since the decision herein the Wisconsin supreme court has been called upon to again consider whether benevolence or business is the pervading characteristic of fraternal societies. In *Morse v. Modern Woodmen*, *supra*, responding to the contention that the defendant was not liable for the torts (libel) of its agent (unless negligent in his selection) because a benevolent society and its funds were trust funds, the court said:

"While the order has social, benevolent and charitable features, it is essentially, so far as the Head Camp is concerned, an insurance corporation conducted on the assessment plan. It appears in the evidence that it has two principal funds: The benefit fund, out of which death claims are to be paid; and the general fund, which may be used for other purposes, and out of which hundreds of thousands of dollars were paid for services and expenses in combating the effort to secure a repeal of the legislation raising the premium rates (not in influencing legislation it should be said). True, the defendant has no

vast reserve fund, as the old line insurance companies have, and for legislative purposes a clear distinction may be drawn between the two classes of corporations. *N. W. M. L. Co. v. State*, 163 Wis. 484."

Doubtless there are fugitive and comparatively inconsequential instances where the insurance feature is the incident of the charitable or benevolent purpose. But classification should rest on the characteristics of the class, and not upon exceptions or remote incidents. When fraternalism is thus viewed, it seems plain that to exempt that class of mutual insurance associations from all taxation, and at the same time to heavily burden mutual level premium companies, cannot find justification in the alleged moral, charitable or benevolent activities of the former, nor at all.

3. Difference in reserve maintained, or expense of administration, does not warrant classification.

It is said by the state court that the fraternalists "have no such immense volume of reserve funds" as have other companies. (Tr. fol. 121.) If a tax is to be laid on the basis of reserves, then the volume cannot justify exemption of one class of insurers. The smaller volume would justify a proportionately smaller tax but would not justify immunity from taxes altogether. The reserve on a policy is a sum set aside to take care of the ultimate liability of the insurer. The reserve in any new company of either kind must necessarily be small. As to either kind of companies that have been long established and have been writing a large volume of business and that

accumulate a reserve, the volume will necessarily be large. The plaintiff was one of the large life insurance companies of the world when this controversy arose. Large as it was, there was at least one fraternal organization that carried more insurance than it did, and others that approximated it in size. (Tr. pp. 42, 46). There are a number of level premium life companies organized under the laws of Wisconsin. (Tr. fol. 179.) It is no doubt safe to say that, with the exception of plaintiff, their reserves do not approximate in volume the amount of reserve carried by many of the fraternal. If a line could be drawn between large and small reserves, then the level premium company with a small reserve should be placed on a parity with the fraternal having a small reserve.

Note also averment showing statutory requirements as to minimum rates of assessment, and maintenance of substantial reserve, and similar scope and extent of state supervision. (Tr. fol. 184.)

In justifying the classification made the state court stated (apparently as a fact of common knowledge) that fraternal organizations have no great expense account and conduct their insurance business at comparatively small cost. It might be admitted because true that agents' commissions for securing business in level premium companies are larger than in fraternal. Aside from this item, the court's statement would hardly hold good. In any event, the fact that those who insure in mutual level premium companies must pay more in the way of expense than do those who insure in fraternal is hardly a justification for increasing the burden that the first named class must already bear. If the statement argues anything,

it argues in favor of lightening the cost to those who are obliged to bear a large expense factor in connection with their insurance. The fact that one business institution, or one set of business institutions, conducted their business at less expense than others engaged in the same line of business, has never been considered a just ground for imposing enhanced taxation on those institutions whose expenses were the greater.

Before absence of large reserve assets or lesser expense of administration, or cheaper insurance, can be held a sufficient ground for the classification which the statute makes it ought to appear that these differences would *not* have had recognition had the legislation taxed both classes on a similar basis. If, as is apparent, the like basis would provide for them it would seem necessarily to follow that they cannot constitute legitimate grounds for the classification. Alleged differences which *equality* of treatment would recognize and care for cannot justify *inequality* of treatment. Rather should they be held to demonstrate arbitrariness.

4. Case cited by the state court as sustaining the classification.

This case is one which we interpreted as of aid and comfort to the plaintiff rather than to defendant.

German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

The question in the case cited was whether the exception of farmers' mutual companies or persons engaged in the insurance business from a law *regulating fire insurance rates* was discriminatory classification. Inasmuch as the rates of mutual companies

are based on *cost* there was room to justify their exception upon the ground that their plan of insurance removed occasion for regulating their rates. This court sustained the classification by a bare majority. That it should thus have divided on the wholly different question whether *for purposes of rate regulation*, the exemption of farmers' mutual companies was justifiable, points the conclusion, as it seems to us, that the classification here under consideration is clearly arbitrary.

5. The exemption of fraternal associations not aided by the retaliatory statute.

Lodge fraternal are wholly exempted from the tax. Moreover, the retaliatory statute has no application to domestic associations. (Sec. 51.33, Wis. Stats.; Appendix, p. 132).

Respectfully submitted,

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APPENDIX

SECTION 1220, WIS. STATS. 1911 (NOW SEC. 51.32):

"Life insurance companies to pay annual license.
Section 1220. Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

"Domestic companies, three per cent of gross income.

(1) If such company, corporation or association is organized under the laws of this state, and is not purely an assessment or stipulated premium plan company under chapter 270, laws of 1899 (sec. 1955—1), three per centum of its gross income from all sources for the year ending December 31st, next prior to said first day of March excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured.

"Foreign companies, three hundred dollars. (2) If any such company, corporation or association is organized without the state of Wisconsin, and is not purely an assessment company, it shall pay into the state treasury, as such annual license fee, the sum of three hundred dollars, except that whenever the similar taxes and fees imposed upon a company of another state under section 1221, shall exceed

three hundred dollars, the amount of the annual license fee shall be deducted.

"License fees of other companies. Section 1220a. Every other such association, corporation or company doing business within this state, whether organized within or without the state, including all assessment companies and associations, and stipulated premium plan companies under chapter 270, laws of 1899, and excepting only such fraternal organizations as are hereinbefore specified, shall, on or before the first day of March, in each year, pay into the state treasury of the state as an annual license fee, the sum of three hundred dollars.

"Power granted by license; license fee in lieu of all taxes, except on real estate. Section 1220b. Such license, when granted, shall authorize the company, corporation or association to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company, corporation or association."

SECTION 1221, WIS. STATS. 1911 (NOW SEC. 51.33):

"Increase of fee of foreign company. Section 1221. Whenever the laws of any other state of the United States shall require of life, fire, accident or inland navigation insurance companies organized under the laws of this state and doing business in such other state any deposit of securities for the protection of their policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by the laws of this state for the same purposes from similar companies organized under the law of such other state and doing business in this state, then all such companies of such other states doing business within this state shall make the same deposit with

the state treasurer and shall pay him the same sum for taxes, fines, penalties, certificates of authority, license fee or otherwise as a condition to the issue of a license to them as is required to be paid by the laws of such other state."

SECTION 1222, WIS. STATS. 1911 (NOW SEC. 51.34):

"License, form of. Section 1222. The license herein provided for shall certify to the fact of the payment of the license fee, be attested by the great or lesser seal thereto affixed, and shall be in such form as shall be approved by the attorney-general."

SUBSEC. 5, SECTION 1947, WIS. STATS. 1911:

"Licenses requisite for all life insurance; revocation for removing actions. 5. No life insurance corporation whatever shall do any business in this state, nor shall any person act as agent or otherwise within this state in receiving or procuring applications for life insurance or in any manner aid in transacting such business for any such corporation until it shall have first procured a license from said commissioner authorizing it to issue policies of insurance in this state and have paid therefor the license fee required to be paid by section 1220; provided, that in case any such life insurance corporation organized under the laws of any other state or country, having procured license as herein provided, shall remove or make application to remove into any court of the United States any action or proceeding begun in any court of this state upon a claim or cause of action arising out of any business or transaction done in this state it shall be and is hereby made the imperative duty of the commissioner to revoke any and every authority, license or certificate granted to such corporation or any agent thereof to transact any business in this state, and no such corporation or agent thereof shall thereafter transact any business of insurance in this state, till again duly authorized, and no renewal, license or certificate of authority

shall be granted to such corporation for three years after such revocation; and, provided further, that if the license of any such corporation shall be revoked as aforesaid, the attorney last appointed and the agent last designated as acting as such for it shall continue attorney and agent for the purpose of serving process for beginning actions upon any policy or liability incurred or contracted in this state, while it transacted business therein so long as any such liability shall exist."

SECTION 1948, WIS. STATS. 1911:

"Life insurance companies; licenses requisite; asset conditions. Section 1948. No company shall transact business in this state until it shall have obtained a license therefor from the commissioner of insurance.

*"No such license shall be issued until the company has complied with all the requirements of the laws of this state, nor until after such examination as he may require, the commissioner is satisfied that its assets are properly and safely secured and exceed its liabilities, valuing its policies as provided by the laws of this state. * * *"*

SECTION 1951, WIS. STATS. 1911:

"Investments, domestic life companies; other business prohibited. Section 1951. Every life insurance company organized under the laws of this state, may invest its funds and accumulations in stocks or bonds of the United States or of this state, or of any county, city, town, or village, or duly organized school district therein, or in mortgages being first liens on real estate whether held in fee, or as leasehold running not less than twenty-five years, or in fee subject to leasehold, worth at least twice the money loaned thereon or in the mortgage bonds of any railway or street railway company duly incorporated and organized under the authority of this state; and it may also make loans on the security of promissory notes amply secured by pledge of any of the bonds in which

such insurance corporations are hereby authorized to invest their funds, and every such corporation may not only loan to its policyholders, sums not exceeding one-half of the annual premiums on their policies, upon note to be secured by the policies of the persons to whom the loans may be made, but may also make loans upon the security of its own policies to an amount, which with other indebtedness and unpaid instalments of the premium and interest to the next policy anniversary shall not exceed the surrender value specified in the policy, and such corporation may invest its funds in other states, organized territories of the United States, and the District of Columbia, on like securities and under the same restrictions as in this state. No life insurance corporation organized under the laws of this state shall issue policies insuring fire, marine, accident, or live stock risks, nor do any banking business, except as otherwise provided by law."

SECTION 1952, WIS. STATS. 1911:

"Surplus in mutual companies. Section 1952. Every life insurance corporation doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof may make distribution of such surplus as they may have accumulated annually, or once in two, three, four or five years as the directors thereof may from time to time determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, said value to be computed by the American Experience Table of Mortality with interest not exceeding four and one-half per cent. Nothing in this section shall be construed to hereafter permit any such corporation to defer the distribution, apportionment or accounting of surplus to policyholders for a longer period than five years, and on all policies, hereafter outstanding, under the conditions of which

the actual distribution is provided for at a definite or fixed period, the apportioned surplus shall be carried as a liability to the class of policies on which the same was accumulated."

SUBSEC. 1, SECTION 1915, WIS. STATS. 1911:

"Admission of foreign companies; conditions. Section 1915. 1. No company incorporated under the laws of any other state or of any territory or of any foreign government or other insurer having its home office outside of this state shall, directly or indirectly, take risks or transact any business of insurance in this state except upon compliance with and maintenance of the following requirements:

"(a) If a stock company, it shall be possessed of an actual paid-up cash capital equal to that required of like companies organized under the laws of this state.

"(b) Mutual companies may be admitted subject to the same requirements as to solvency and the same limitations as to expenses as like companies of this state. * * *

SUBSEC. 1, SEC. 1917, WIS. STATS. 1913 (in section of Statutes relating to foreign companies):

"Fee; conditions; revocation of license. Section 1917. 1. No insurance corporation shall transact any insurance business in this state without first having paid the license fees and obtained the license therefor as required by law."

ARTICLE VIII, SEC. 1, WISCONSIN CONSTITUTION:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

There was added by amendment in 1908, the following sentence:

"Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

SUBSEC. 2, SEC. 1916, WIS. STATS. 1913:

"Supervision. 2. The commissioner of insurance shall have the same supervision and make the same examination of the business and affairs of every foreign insurance corporation doing business in this state, as of domestic insurance corporations doing the same kind of business, and of its assets, books, accounts, and general condition. Every such foreign corporation and its agents and officers shall always be subject to and be required to make the same statements and answer the same inquiries and be subject to the same examinations, and, in case of default therein, to the same penalties and liabilities as domestic insurance corporations doing the same kind of business, or any of the agents or officers thereof, are or may be liable to under the laws of this state or the regulations of the insurance department."

SEC. 1950, WIS. STATS. 1911:

"Valuation of policies; basis; method. Section 1950. 1. Every life insurance company doing business in this state or having in force in this state, policies issued therein, shall hold funds properly and safely secured to provide for its reserve liability over and above all its other liabilities, which reserve liability shall be determined by the state as follows: * * *

CHAPTER 378, LAWS OF 1903:

"Section 2. Whenever taxable real estate shall be subject to mortgage such mortgage for the purposes of taxation shall be deemed an interest in such real estate and shall be assessed and taxed as such interest in the assessment district in which such real estate is located, and not otherwise and may be separately assessed and taxed as hereinafter provided. When so separately assessed the interest of the mortgagor in such real estate shall be assessed for only such value or amount as shall remain after

deducting the assessed value of the interest of the mortgagee from the assessed value of the entire real estate."

"Section 3. At the option of the mortgagor both such interests may be assessed and taxed together, without separate valuation, to the mortgagor or occupant the same as unincumbered real estate. In such case the combined valuation of both interests shall not exceed the just valuation which should be placed upon such real estate if unincumbered."

SEC. 1087m—1, WIS. STATS. 1911:

"*Persons and subjects taxable. Section 1087m—1.* There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described; * * *."

SUBSEC. 2, SEC. 1087m—2, WIS. STATS. 1911:

"2. The term 'income,' as used in this act, shall include:

"(a) All rent of real estate, including the estimated rental of residence property occupied by the owner thereof.

"(b) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever.

"(c) All wages, salaries or fees derived from services; provided that compensation to public officers for public service shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the constitution.

"(d) All dividends or profits derived from stock or from the purchase and sale of any property or other valuables acquired within three years previous or from any business whatever.

"(e) All royalties derived from the possession or use of franchises or legalized privileges of any kind.

"(f) And all other income of any kind derived from any source whatever except such as is hereinafter exempted."

SUBSEC. 3, SEC. 1087m—2, WIS. STATS. 1911:

"3. The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided, that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of section 1770b, as far as applicable."

SEC. 1087m—3, WIS. STATS. 1911:

"Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:

"(a) Payments made within the year for personal services of officers and employes actually employed in the production of such income; provided, there be reported the name, address and amount paid each such officer or employe to whom a compensation of seven hundred dollars or more shall have been paid during the assessment year.

"(b) Other ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property, including a reasonable allowance for deprecia-

tion of property from which the income is derived. * * *

"(c) Losses actually sustained within the year and not compensated for by insurance or otherwise.

"(d) Sums paid by such person within the year for taxes imposed by any state of this union or subdivision thereof, or any territory or possession of the United States, upon the source from which the income taxed by this act is derived.

"* * *

"(f) Interest received from bonds or other securities exempt from taxation under the laws of the United States."

SECTION 1036, WIS. STATS. 1898:

"The term 'personal property' as used in this title shall be construed to mean and include * * * all debts due from solvent debtors, whether on account, note, contract, bond, mortgage or other security, or whether such debts are due or to become due; * * *"

SECTION 1038, WIS. STATS. 1898:

"The property in this section described is exempt from taxation to-wit: * * *

10. So much of the debts due or to become due to any person as shall equal the amount of bona fide and unconditional debts by him owing."

IN THE

Supreme Court of the United States

October Term, 1916.

No. 605

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

Plaintiff in Error,

v.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

SPENCER HAVEN,

*Attorney General of Wisconsin,
Attorney for Defendant in Error.*

WALTER DREW,

Of Counsel.

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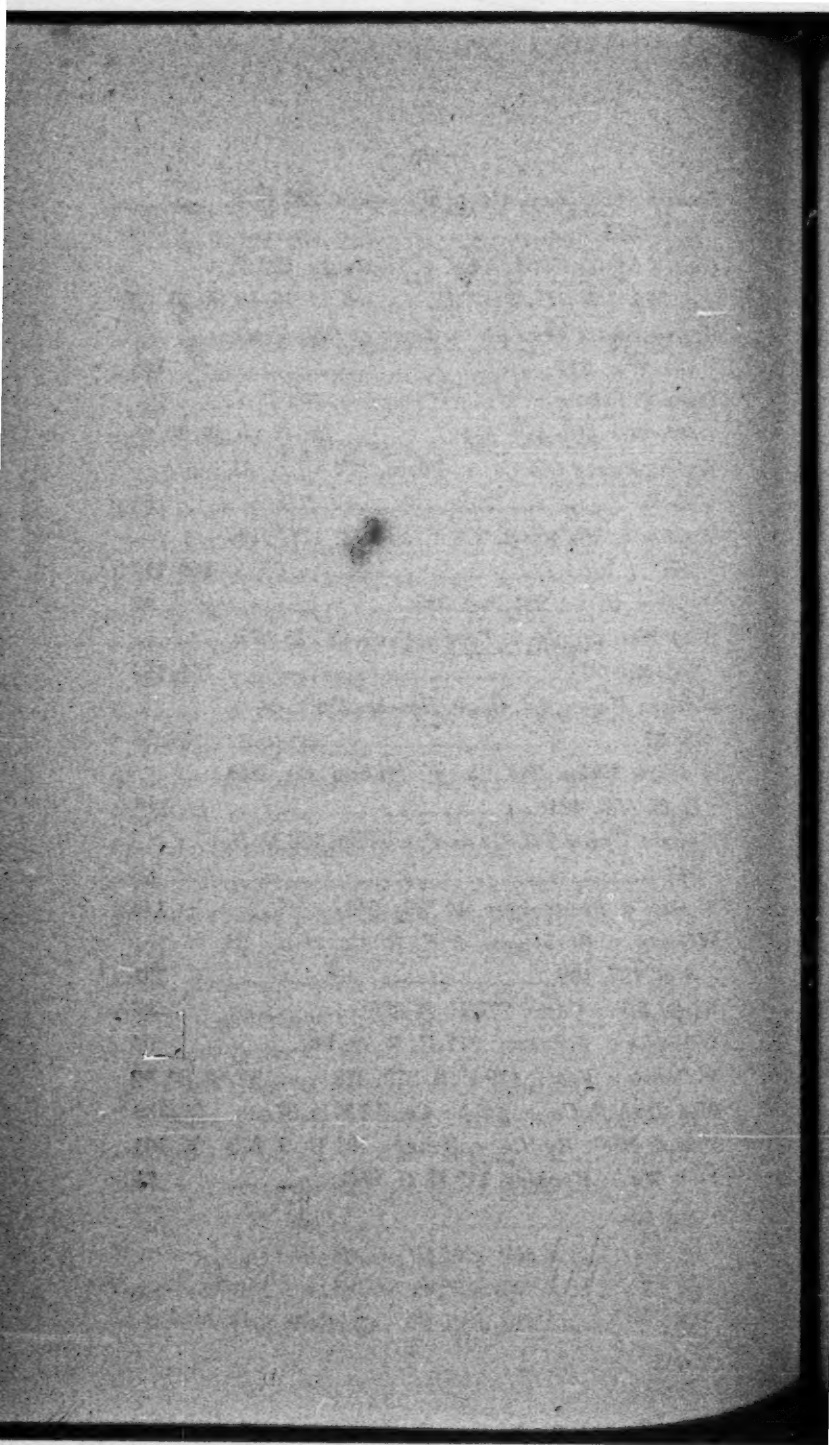
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IN THE
Supreme Court of the United States

October Term, 1916.

No. 605

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,

Plaintiff in Error,

v.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

This action was brought, under state statutes permitting such actions against the state, in the original jurisdiction of the supreme court of the state, by the plaintiff in error⁽¹⁾ to recover license fees paid by it under protest to the defendant in error⁽²⁾ in 1912 and 1913. The theory of plaintiff's action and the ground upon which it seeks to recover, so far as the action is subject to review in this court, is that the state statute under and

(1) Hereinafter referred to as the "plaintiff."

(2) Hereinafter referred to as the "defendant."

by virtue of which payment of said license fees was demanded and enforced by defendant was and is unconstitutional and void as in contravention of the Commerce Clause, section 8, article I, of the constitution of the United States, and of the inhibitions of the Fourteenth Amendment that

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The demand of the complaint is for the sum of \$987,836.45 (being the sum of \$482,193.23 paid February 29, 1912, and \$505,643.22 paid March 1, 1913), with interest thereon, making a total at this writing of upwards of \$1,300,000.00. It is proper for this court to be advised, also, that this plaintiff has likewise paid under protest its license fees for subsequent years, and has brought against the defendant two additional similar actions each to recover upwards of a million dollars, which actions are now pending in the supreme court of the state awaiting the decision of this court in the case at bar. The decision here will, moreover, be determinative of the right of the state to future revenues of upwards of half a million dollars annually.

There were two decisions in the action by the court below, the first and principal decision (Trans. pp. 2-12) being upon a demurrer interposed by defendant to the original complaint and the second (Trans. pp. 51-53) being in effect supplementary of the first and rendered upon a demurrer to the complaint as amended after the first decision. To the original complaint the defendant demurred to the jurisdiction of the court and

generally. The questions of jurisdiction being resolved by the first decision against defendant, the demurrer to the amended complaint (Trans. p. 51) was general merely, viz.:

"That it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action."

The state court overruled plaintiff's contentions as to the construction of the statute affecting the amount of the license fees demandable thereunder and also plaintiff's objections to the constitutionality of the statute under both the state and federal constitutions. The decision of the highest court of the state is, of course, conclusive upon the jurisdiction of the state court to hear and determine the action, upon the construction of the state statutes involved and upon their validity as affected by the state constitution. There is left for review here, therefore, only the federal questions under the Commerce Clause and under the Fourteenth Amendment. The decisions of the state court upon these federal questions are brought here by writ of error. These questions only are saved and presented here by the assignment of errors. (Trans. p. 1.)

The License Fee Statute

The Wisconsin statutes more directly involved are set forth at length in the complaint (Trans. p. 27-29). These statutes are:

Section 51.32, (1) and (2) (formerly numbered and sometimes still referred to in other statutes as section 1290 of the statutes) imposing and fixing the basis of license fees required to be paid by "level premium" or

"old line" life insurance companies, domestic and foreign;

Section 51.32 (3), formerly section 1220a, imposing and fixing the amount of license fee required to be paid by life insurance concerns doing business on the assessment plan and on the stipulated premium plan under chapter 270, laws of 1899;

Section 51.32 (4), formerly section 1220b, providing that the license shall authorize the grantee to transact business for one year and that

"such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state,"

except taxes on real estate;

Section 51.33, formerly section 1221, the so-called "Retaliatory Law" subjecting foreign insurance companies, whose home states impose upon Wisconsin companies greater tax or excise burdens than are imposed upon such foreign companies by Wisconsin, to like greater taxes or other burdens as a condition of the granting to such foreign companies of the right to do business in Wisconsin;

Section 51.34, formerly section 1222, declaring that the license provided for shall certify to the payment of the license fee, etc.;

Section 1947, subsection 5, declaring that no life insurance corporation shall transact business in the state until it shall have obtained a license and paid the license fee required by section 1220;

Section 1948, declaring that no (insurance) company shall transact business without license and that no such license shall be granted until the company has complied with all the laws of the state nor until after examination by the commissioner of insurance as provided;

Section 1951, regulating the investment of the funds of domestic life insurance companies.

At this point we will set forth only the provisions of the license fee statute by which the license fee required to be paid by the plaintiff was imposed and the amount thereof measured, viz.:

"Section 51.32 (formerly section 1220). Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

"Domestic companies. (1) If such company, corporation or association is organized under the laws of this state, and is not purely an assessment or stipulated premium plan company under chapter 270, laws of 1899 (sec. 1955—1), three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March, excepting therefrom income from rents of real estate, upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured."

The license fee statutes, it will be noted, exempt from their requirements

"such fraternal societies as have lodge organizations and insure the lives of their own members, and no others,"

and, it should be understood, that no other statute of the state, exacts any license fee or other similar exaction of such fraternal societies.

Defendant's demurrer to the complaint, of course, admits, for present purposes of the case, all allegations of fact well pleaded in the complaint. In view of the large amounts involved in the case and of the significance to be attached to the facts as alleged therein, we regard a summary of the allegations of the complaint, for the purpose of calling attention more particularly to the more salient features, as a proper part of a statement of the case on behalf of the defendant. Such summary or abstract is presented rather with the view of supplementing than of controverting the statement of the case presented on the brief for the plaintiff.

The complaint states at length two alleged causes of action, one for license fees paid in 1912 and one for license fees paid in 1913. The allegations in the second cause of action as pleaded are the same in form and effect as those in the first, except only in the figures, dates and amounts stated, and these differences do not present any difference of relation or affect in any way the questions here to be considered or determined. Hence it has been agreed (Trans. p. 54) that only so much of the complaint as pertains to the first cause of action need be here printed. The case will be here presented and argued upon only the first cause of action. Any conclusion reached by the court upon the first cause of action would necessarily apply likewise upon the second.

The license fee statute, as has been seen, measures the license fee payable in any year upon certain of the plaintiff's gross revenues or income received by it during the next preceding calendar year. Hence, is explained, the circumstance that the allegations of the first cause of ac-

tion, for license fees paid in 1912, relate to the business transacted, amount of insurance, investment holdings, etc., during the year 1911 or as of December 31, 1911.

The Complaint

Plaintiff is and has been, since 1857, a Wisconsin corporation, authorized to transact the business of life insurance and to invest its premium and other income and funds belonging to it in policies or obligations issued by it, in mortgages on real estate, in government, state and municipal bonds, in loans secured by pledge of railroad property and in collateral loans secured by pledge of any such securities. (Trans. p. 16.) Its principal office, called its "Home Office," is located in the city of Milwaukee.

Plaintiff has always been and has always transacted business as a mutual company, its membership being confined to its policy holders, and never as a stock company. It has for many years been engaged in transacting the business of life insurance, "including the investment of its assets and funds" on a large scale in all the states and territories except Louisiana, Mississippi, Alabama, South Carolina, Florida and Alaska.

Plaintiff had, December 31, 1911, existing contracts of life insurance with residents of the several states aggregating \$1,147,273,523, covered by 447,507 policies and requiring premium payments aggregating \$40,421,263.23, of which 37,275 policies, aggregating \$85,149,148 and requiring premium payments of \$2,836,488.04 were with residents of Wisconsin. A table is presented showing the continuous growth and the amount of plaintiff's insurance business, 1900 to 1915, inclusive, viz. 1900, total insurance in force \$529,647,290, annual premium \$20,-

865,265.96; 1915, total insurance in force \$1,420,012,571, annual premium \$49,461,752.31.

It is alleged:

"That said several policy contracts between said plaintiff and the residents of said states have been and are subject to sale, assignment and transfer, and to use as collateral security and other commercial purposes, and that the same have been and are a common subject of sale, pledge, assignment and transfer as articles of commerce, and have been and are used extensively as collateral security and for other financial and commercial uses, and are valuable for each and all of said purposes and for other general purposes of trade and commerce, and many of them are applied for and issued for the sole purpose of protecting and increasing the value of the rights and property of individuals and corporations engaged in financial and commercial transactions." (Trans. pp. 17-18.)

The manner and means of carrying on plaintiff's business are described in detail. Plaintiff, by contract in writing executed at the home office, employs agents to solicit applications for insurance. Such applications being transmitted to the home office and there examined and approved, policies as applied for are prepared and executed by the officers of the company at the home office and sent to the agents for delivery to the applicants and for collection of the first premium. The total number of plaintiff's agents and subagents (appointed by agents subject to approval of the home office), December 31, 1911, was 5,014, of whom 480 were in Wisconsin.

The plaintiff also employs in the various states in which it does business "medical examiners" and "alternate medical examiners," appointed by its officers at its home office, to make physical examination of applicants for insurance and report thereon to the plaintiff at its

home office, the home office alone determining the applicant's insurability and whether or not a policy of insurance shall be issued. The plaintiff so employs in the several states about 12,000 such medical examiners. (Trans. pp. 18-19.)

The plaintiff also maintains at its home office a division known as the "Inquiry Division" for procuring information with respect to applicants for insurance or with respect to those already insured, and in carrying on the work of said inquiry division employs inspection agencies in the several states. The number of reports received by mail, telegraph and telephone to this division at the home office during the year 1911 was upwards of 56,000.

The plaintiff for many years has prepared and transmitted by mail, express and freight, from its home office, to the persons employed by it in the various states, forms, stationery, soliciting material, instructions, educational and canvassing documents and other supplies, the number of such packages so shipped in the year 1911 being over 17,000. About 2,500 separate pieces of mail are posted from the home office each day and not less than 1,800 pieces of mail per day are received.

None of plaintiff's agents or representatives have ever been authorized to accept risks of any kind or to make, modify or discharge contracts, but all such contracts are authorized or approved at the home office.

All officers of the plaintiff reside in the city of Milwaukee, Wisconsin, and have their offices in the home office building in said city. (Trans. p. 19.)

The plaintiff's contracts of insurance are made, modified, continued or performed as follows:

The application for insurance is taken by a soliciting agent and transmitted to the home office. The applicant

is physically examined by a local medical examiner and his report is transmitted to the home office. Upon receipt of the application and report the same are examined by the medical department at the home office and if approved a policy contract is executed by the officers of the plaintiff and transmitted by mail to plaintiff's agent for delivery to the applicant and collection of the first premium. (Trans. pp. 19-20.)

Monthly statements on blanks, prepared at the home office, are required of and furnished by agents, which, when made out are, together with remittances to cover premiums collected, transmitted to the home office where the statements are checked and the remittances are deposited in the bank.

All policy contracts are payable at maturity at the plaintiff's home office and all premiums are payable at its home office or to its agents upon delivery of a receipt signed by its proper officers. No modification of the contract can be made except by officers of the plaintiff at its home office and all premiums upon receipt at the home office are there deposited in the bank. (Trans. p. 20.)

Policies issued by the plaintiff provide for advances to policy holders upon pledge of the policies as sole security therefor, the amount of such advances on December 31, 1911, being \$41,988,863.02. Such advances are all made upon application from the policy holder to the home office and upon his assignment and delivery of the policy at the home office.

When annual premiums stipulated in its policy contracts have been paid for a certain number of years, plaintiff's policies acquire a "reserve value," which the insured is entitled to demand of the plaintiff even though he discontinues the payment of premiums. (Trans. p. 21.)

After a policy has acquired a reserve value, the policyholder may terminate the contract by taking down the reserve value or may continue payment of the annual premium, and, with consent of the plaintiff and upon security of the policy properly assigned, receive in advance the cash surrender value of the policy. (Trans. pp. 21-22.)

It is alleged:

"In the operation of the plaintiff's business the amount of the annual premium charged, the results promised to policyholders, and the provision of a fund out of which its said policies are eventually to be paid at maturity, are based upon calculations showing the total fund which will be accumulated from payments of annual premiums and from interest derived from their investment and the reinvestment of such interest when earned. These calculations assume that all premiums paid will constitute an interest earning fund."

Of \$41,988,863.02 total policy loans outstanding December 31, 1911, \$39,300,995.11 was advanced to policyholders outside of Wisconsin and of the \$2,133,151.99 total extra premiums or interest paid thereon in 1911, \$1,983,556.96 was collected by plaintiff from policyholders residing outside of Wisconsin. (Trans. p. 22.)

In conformity with its charter and the laws of Wisconsin, plaintiff conducts the investment of its funds as follows: It employs special loan agents who reside and maintain offices in nineteen or more states and are under supervision of a superintendent of special loan agencies employed at the home office. Said loan agents solicit, on application forms sent to them from the home office, applications for loans on security of real estate, examine the value and character of the real estate and prepare and transmit to the home office, with the signed appli-

cations, reports with reference thereto. They see that abstracts of title are secured and transmitted by mail or express to the home office for examination; see that the notes and mortgages, as prepared at the home office and sent to them by mail or express, are properly executed and returned to the home office; receive and deliver to the borrower plaintiff's check or draft for the amount of the loan and have the mortgage recorded and the abstract of title extended and return all papers by mail or express to the home office. (Trans. p. 23.)

The abstract of title and all evidences of title, together with the note and mortgage, are retained by plaintiff at its home office until the loan is fully paid and released. Principal and interest on said loans are made payable and are paid at plaintiff's home office. All extensions or partial releases are executed at the home office and sent by mail to the parties at their several places of residence. A large amount of correspondence and use of mails, express and other agencies of transportation are required in connection with such real estate loans and in reference to fire insurance and taxes on the mortgaged premises, etc. (Trans. p. 24.)

December 31, 1911, plaintiff had outstanding 21,208 real estate loans in various states to the amount of \$153,562,654.39, all outside of Wisconsin except 494 loans amounting to \$5,654,369.10. (Trans. pp. 24-25.)

Plaintiff has, through parties residing outside of Wisconsin, invested a portion of its funds in municipal and railroad bonds, negotiations for the purchase of which have been largely by mail. The bonds, when purchased, have been transmitted by mail or express to the home office, payment therefor being sent also by mail or express from the home office. Payments of principal and interest on bonds are likewise sent by mail or express to

the home office, usually preceded by the forwarding by mail or express from the home office to the nonresident bank or fiscal agent where payable of the interest coupons. The amount of such bonds owned by plaintiff December 31, 1911, was \$76,185,385, all payable outside of Wisconsin. (Trans. p. 25.)

In many of the states where plaintiff transacts business, the laws require plaintiff to pay policyholders on demand 90% or more of the reserves on their policies. In order to be able to meet such demands, plaintiff must have readily convertible securities, which requires plaintiff's making of said bond investments as aforesaid. Table I, Trans. p. 41, shows the amount of plaintiff's mortgage loan and bond investment transactions in 1911. (Trans. p. 25.)

Plaintiff has at its home office and elsewhere in Wisconsin a large amount of permanent property upon which it paid real estate taxes in 1911, amounting to \$19,001.38.

Plaintiff carries on its business and operations without separation of state and interstate business and is not required to separate and report for taxation its income from domestic business. The investment expense incurred by plaintiff in 1911 was \$755,764.18, of which over 95% was incurred in carrying on that portion of plaintiff's investment business transacted with nonresidents of Wisconsin. (Trans. p. 26.)

The greater part of plaintiff's business, both in selling life insurance and in the investment of its funds, is conducted as aforesaid and all thereof with residents of states other than Wisconsin, constitutes, as plaintiff is informed and believes, interstate intercourse or commerce among the several states within the meaning of section 8, article I of the constitution. (Trans. p. 26.)

The proportion of plaintiff's business transacted with nonresidents of Wisconsin, as of December 31, 1911, was:

1. Of the total number of policies in force, more than 90%;
2. Of the total amount of insurance in force, more than 92%;
3. Of the total real estate mortgage loans, more than 96%;
4. Of the total amount of bonds, more than 95%;
5. Of the total amount of policy loans, more than 93%;
6. Of the total payments in 1911 for death losses and endowments, more than 93%;
7. Of the total gross receipts from all sources in 1911, more than 93%;
8. Of the total premium receipts for 1911, more than 92%. (Trans. pp. 26-27.)

The complaint sets forth section 51.32 (1), (2), formerly section 1220; section 51.32 (3), formerly section 1220a; section 51.32 (4), formerly section 1220b; section 51.33, formerly section 1221; section 51.34, formerly section 1222; section 1947, subsection 5; section 1948 and section 1951 of the Wisconsin statutes, which statutes provide the only method relating to the payment of license fees or taxes by all corporations and associations doing the business of furnishing life insurance in Wisconsin. Summarised, the license fees imposed by these statutes for the privilege of transacting life insurance business in the state and as an exaction in lieu of all taxes except taxes on real estate are as follows:

1. Domestic level premium companies, 3% of their gross income, less income from rents of real estate and less premium receipts from outside of the state.

2. Foreign level premium companies, \$300 or such larger amount as may be imposed under the retaliatory law, section 51.33, formerly section 1221.
3. Assessment and stipulated premium plan companies, domestic and foreign, \$300 or, as to foreign companies, such larger amount as may be imposed under the retaliatory law.
4. Fraternal societies, as defined by the statutes, exempt. (Trans. pp. 27-29.)

It is alleged:

"That in the year 1907 there was and ever since has been in force in every state of the United States under whose laws any life insurance companies have been organized which have been licensed to transact business in Wisconsin, statutes similar to section 51.33, Wisconsin statutes above quoted." (Trans. p. 29.)

Plaintiff's business is based upon the old line or level premium plan of life insurance, under which the insurance contract specifies a fixed premium and a fixed amount of loss or benefit payable on maturity of the contract. In determining the amount of premium to be charged it is essential to consider the cost to plaintiff on maturity of the contract, the probable time of maturity and the amount which will accrue from investment of the premiums, which accrual will depend upon the ability of the plaintiff to invest its premium and other income and the rates and terms upon which it may be invested. Without the ability freely to

"invest its funds upon advantageous rates, and terms, the conducting of a life insurance business by plaintiff would be wholly impossible."

Plaintiff is authorized by its articles of organization to

issue its policies and make such investments in all the states and territories and plaintiff has availed itself of this right to invest funds, and its contracts for the payment of indemnity or death losses aggregating over a billion dollars have been made upon the faith of such right. This right of plaintiff has always been recognized by the laws of Wisconsin. (Trana pp. 29-30.)

During 1911, before and since, numerous insurance corporations organized in other states, were transacting the business of life insurance in Wisconsin on the old line or level premium plan, some of which were mutual companies of the same character as the plaintiff. There were also a number of other domestic old line companies in said state, some of which were not and are not, however, transacting business in other states having insurance companies transacting business in Wisconsin. All of said old line companies, domestic and foreign, transact a life insurance business of the same kind and character as the plaintiff's and, except as to taxation, are, by the laws of Wisconsin, subject to like state regulation and supervision. (Trana pp. 30-31.)

Under the statutes aforesaid, plaintiff was required to pay as a condition of transacting business in Wisconsin, 3% of its gross income from all sources except rents of real estate and except premiums collected outside the state on policies held by nonresidents. Other domestic level premium companies, including those not transacting business in other states having companies transacting business in Wisconsin, paid license fees on the like basis. Foreign companies were at the same time required to pay, as a condition of transacting business in Wisconsin like that transacted by said domestic companies, a license fee of \$300 each, plus such, if any, additional amount as would result from the application to any of them by Wis-

consin of the standard of taxation imposed by the state of their organization upon like Wisconsin companies there transacting business. (Trans. p. 31.)

Table II, Trans. p. 42, shows a comparison of the plaintiff's life insurance business and income from investments, as a whole and in Wisconsin, for the year 1911, and the license fees paid by the plaintiff thereon with the amount of business, income and license fees paid by all other domestic level premium companies, by all foreign level premium companies doing business in Wisconsin and by the New York Life Insurance Company, a mutual, level premium company, like the plaintiff and the foreign company having the largest Wisconsin business similar to that of the plaintiff. (Trans. pp. 31-32, 42.)

During the year 1911, as well as before and since, there were licensed and transacting business in Wisconsin, a large number of incorporated fraternal associations, domestic and foreign, insuring the lives of their own members, the bulk of such business being done by a small number of such associations. Table IV, Trans. p. 44, shows, for the year 1911, the total amount of fraternal benefit certificates in force, the amount in force in Wisconsin and the amount issued during the year in Wisconsin by each domestic fraternal association. Table VI, Trans. p. 46, shows the total amount of benefit certificates outstanding in 1911, the amount outstanding in Wisconsin and the amount issued during the year in Wisconsin by all fraternal, domestic and foreign, and by each of ten of the larger and more important fraternals, the same being foreign associations. (Trans. p. 32, 44, 46.)

During 1911, there were no domestic assessment or stipulated premium plan companies in Wisconsin but

there were three foreign assessment companies, one of which is still transacting business in the state. Table VIII, Trans. p. 48, shows for each of said three foreign assessment companies in 1911 the total amount of insurance outstanding at the end of the year, the amount outstanding in Wisconsin and the amount issued in Wisconsin during the year. None of said assessment companies has any lodge or ritual system or is organized for social, benevolent or charitable purposes, but the activities of each is confined to the transaction of the insurance business upon the mutual and assessment plan. (Trans. pp. 32, 48.)

During 1911 and since the statutes of Wisconsin have excluded from the state fraternal and assessment associations unless their by-laws require the collection of prescribed minimum rates of assessment and the maintenance of a substantial reserve, and have regulated the investment of assets the same as those of life insurance companies, and provided for the valuation of their policies and subjected them to other regulatory requirements similar to and of like scope and extent to those imposed upon level premium companies. (Trans. p. 33.)

The license fee statutes "unjustly, arbitrarily and unlawfully discriminate" as between plaintiff and foreign level premium companies, as between plaintiff and assessment and stipulated premium plan companies, domestic and foreign, and as between plaintiff and fraternal associations, domestic and foreign, and also impose upon plaintiff an unjust and inequitable burden as compared with others in the state, viz :

Domestic level premium life insurance companies are the only insurance companies of any kind as to which an unequal rate of taxation has ever been applied as

between domestic and foreign companies and are the only corporations of any kind taxed on a license fee basis as to which any difference in the rate of taxation is made between foreign and domestic companies.

As to no insurance companies except domestic level premium life insurance companies like plaintiff do the laws of Wisconsin attempt to impose any tax upon income, earnings or receipts from without the state.

As appears from Table IX, Trans. p. 49, the fee exacted from plaintiff was nearly twice as great as the combined fees paid by all other insurance companies of all kinds doing business in Wisconsin in 1911.

As appears by Table X, Trans. p. 50, the fee paid by plaintiff was .17% of its gross personal assets in 1911 and 16.9% of Wisconsin premiums collected, whereas the combined fees paid by the three largest domestic fire insurance companies doing business in the state was but .088% of their gross personal assets and only 2.031% of their Wisconsin premiums collected. (Trans. pp. 33-34, 49, 50.)

Prior to 1911 the expenses of government in Wisconsin were largely met by direct taxation of real and personal property. In the taxation of credits, notes, bonds, mortgages, etc., the state laws have always provided for a deduction to the extent of the owner's outstanding debts. The total of plaintiff's reserve liability, December 31, 1911, was \$279,508,086.41, which, with its unassigned surplus of \$6,067,133.03, made the total of plaintiff's liabilities \$285,575,219.44, which equaled plaintiff's total assets. Plaintiff's total assets, December 31, 1911, exclusive of real estate, were \$283,468,970.69. (Trans. pp. 34-35.)

Personal property taxation in Wisconsin was largely superseded in 1911 by the adoption of an income tax

law, which taxes owners of such credits only upon the net income derived therefrom. The income of banks, trust companies, building and loan associations and corporations required to pay license fees directly into the state treasury in lieu of taxes are exempt from taxation under the Income Tax Law. No law has ever been enacted by any other state which imposed a tax on the gross or net business or investment income of life insurance companies. (Trans. p. 35.)

Plaintiff's taxable income and tax under the federal Special Excise Tax of August 5, 1909, and under the Income Tax Law of October 3, 1913, were amounts stated. (Trans. p. 35.)

Ever since the enactment in 1899, of section 51.32, formerly section 1220, plaintiff has sought to secure relief from the excessive taxes imposed thereby and the state tax commission has investigated and reported and recommended the enactment of a law taxing life insurance companies five per cent on the Wisconsin proportion only of their gross income. The legislature in 1911 and again in 1913 refused to pass such law. Plaintiff's tax under such a law would be only about one quarter of the amount exacted of it under section 51.32. Plaintiff delayed action to have section 51.32 declared unconstitutional until efforts to secure a modification of it had failed. (Trans. p. 36.)

Plaintiff's taxable income (under section 51.32) for the year 1911, as claimed by defendant and upon which defendant measured and exacted a license fee at the rate of 3% amounting to \$482,193.23 in 1912, was the sum of \$13,073,107.76 made up of the following items of income:

1. Wisconsin premiums -----	\$2,836,488.04
2. Interest on real estate mortgages ..	7,446,393.10
3. Interest on bonds -----	3,172,489.58
4. Interest on bank deposits -----	73,735.15
5. Interest on premiums collected in the conversion of term policies and in the restoration of lapsed policies -----	65,730.11
6. Interest on agents indebtedness ..	1,795.17
7. Gross discount on claims paid in advance -----	18,281.01
8. Gross interest on premium notes, policy loans, etc. -----	2,163,808.84
9. Interest included in deferred quar- terly and semiannual premiums ..	294,386.76
Total -----	\$16,073,107.76

Plaintiff, February 29, 1912, paid under protest a license fee of 3% on said sum amounting to \$482,193.23. (Trans. pp. 36-37.)

Plaintiff alleges that said license fee so paid was excessive, illegal and void and was paid involuntarily and under duress, that the license fee statute is unconstitutional and that plaintiff, on February 17, 1913, presented its claim to the legislature for the refund of said license fee, which claim was by joint resolution passed by the senate and assembly wholly rejected and disallowed. Wherefore, plaintiff brings this action and demands judgment against this defendant for the amount of said license fees with interest thereon from the date of payment thereof. (Trans. pp. 38-39.)

The Decisions of the State Court

The decisions of the highest court of the state on the questions brought here by the writ of error are brief. On the objections to the license fee statute raised by plaintiff under the Commerce Clause, that court in the opinion written by Chief Justice Winslow on the original complaint held:

“Passing to the consideration of the question whether the statute imposes an unlawful burden on interstate commerce the argument is that, while the business of insurance, i. e., issuing policies, collecting premiums and paying losses, is not interstate commerce (*N. Y. Life Ins. Co. v. Deer Lodge Co.*, 231 U. S. 495), the business of loaning money on real estate or other security to the citizens of other states is undoubtedly interstate commerce which is necessarily burdened by the tax in question. The investment business of the plaintiff is indeed a vast one considered by itself alone. It appears that the plaintiff in December, 1911, possessed nearly \$150,000,000 worth of foreign mortgage loans, and between \$70,000,000 and \$80,000,000 worth of foreign bonds. The carrying on of such a business necessarily requires constant transmission from state to state of applications for loans, abstracts, notes, bonds, mortgages, policies, drafts and other papers to say nothing of the employment of agents in the various states where the loans are made.

“It is said that the foreign investment branch of the business is not interstate commerce because it is a mere necessary incident of, and cannot be considered apart from, the insurance business which, as we have seen, is held by the federal supreme court not to be interstate commerce. The argument may be sound, but we do not pass upon it. We shall undertake no voyage of discovery on the sea of interstate commerce unless we are compelled to do so. That sea is a troubled one, full of rocks and shoals,

as yet imperfectly charted. We do not find ourselves compelled to embark upon it in this case.

"If, as argued by the plaintiff, the investment business be a separate business and a form of interstate commerce, the answer is that the law places no burden upon that business. It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. If it does not do so, it may transact all the investment business which it desires to transact without paying any license fee under this law.

"It is very well established by federal decisions that when the state exercises its legitimate and rightful power of taxation of an occupation or privilege it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable. *Maine v. G. T. Ry. Co.*, 142 U. S. 217; *Flint v. Stone-Tracy Co.*, 220 U. S. 107; *Baltic M. Co. v. Massachusetts*, 231 U. S. 68.

"In the last cited case it is said in the opinion:

" 'It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state has been sustained (citing cases).'

"These cases seem to us decisive of the question here. The receipts from the foreign investment business are simply used as measuring in part the amount of the tax to be levied not on that business nor on the receipts themselves, but on the business of life insurance conducted by the plaintiff, a subject of taxation which is unquestionably within the legitimate taxing power of the state." (Trans. pp. 9-10.)

In the opinion, also by the chief justice, on the amended complaint, the court said:

"While many new allegations have been added to the complaint we do not regard the situation as essentially changed. The new allegations, for the most part, merely add details to facts alleged in general terms in the original complaint or assumed to exist by the former decision." (Trans. p. 52.)

The prior decision on the interstate commerce question is reaffirmed in this language:

"The interstate commerce feature of the case is reargued and the recent case of *K. C. R. Co. v. Botkin*, 240 U. S. 227 (decided February 21, 1916), is called to our attention as in conflict with the previous opinion in the present case. We have been unable to see in what respect the cases conflict. There are no other contentions made which we deem it necessary to comment upon." (Trans. p. 52.)

Upon plaintiff's contentions that the license fee statute violates the Fourteenth Amendment (and similar provisions of the state constitution) by reason of the discrimination as between domestic and foreign level premium companies, the state court held:

"Under this head the most serious contention doubtless is the contention that there is arbitrary and illegal discrimination between the plaintiff and foreign companies of the same class, i. e., companies doing life insurance business in this state on the level premium plan. The plaintiff a domestic corporation, is required to pay for the privilege of doing business in this state a license fee amounting to three per centum of its gross receipts (certain classes of receipts being excepted), while foreign corporations doing business upon the same plan are required to pay only \$300 per year (except in cases where the retaliatory clause is called into operation), for the same privilege.

"It is clear that this so-called license fee is a privilege or occupation tax, and that, while it is not subject to that clause of the State Constitution which requires the taxation of property to be uniform (section 1, article VIII) it is subject to the general equality clauses of the state constitution and to the clause guaranteeing the 'equal protection of the laws' contained in the Fourteenth Amendment to the federal constitution. It is clear also that this means that there can be no arbitrary or whimsical classification but that there may be classification founded upon real differences of situation and condition affording rational grounds for the difference in treatment. *Black v. State*, 113 Wis. 205, 219; *Nunnemacher v. State*, 129 Wis. 190, 220; *Beale v. State*, 139 Wis. 544, 557; *Connolly v. U. S. P. Co.*, 184 U. S. 540, 559, 560.

"The disparity between the annual license fee required of domestic companies by the law in question, and the fee required of foreign companies is admittedly very great and the question arising is simply, whether there is any substantial difference, other than the difference between foreign and domestic corporations, which differentiates the two classes and which justifies such great difference in treatment.

"The question is by no means an easy one. A corporation is a person within the meaning of the Fourteenth Amendment and a state cannot under that amendment discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse. *Yick Wo v. Hopkins*, 118 U. S. 356; *State v. Hoyt*, 71 Vt. 59, 62, Atl. 973. Every person, whatever his citizenship, is protected against unequal laws.

"On the face of it this law seems to allow foreign life insurance companies to do business in this state upon payment of a mere nominal fee while exacting from domestic companies for the same privilege a very large fee; are there any real differences between the two classes which bear a just and proper relation to the attempted classification and justify this difference of treatment? If there are such

differences the law may doubtless be justified so far as this objection is concerned for it is quite well established that the Fourteenth Amendment does not prevent a state from changing its system of taxation in all proper and reasonable ways, nor from allowing exemptions, nor from imposing different specific taxes upon different trades or professions, nor from classifying property for taxation so long as the classification does not invade rights secured by the federal constitution. *Bell's Gap R. R. Co. v. Penn.*, 134 U. S. 232; *Connolly v. U. S. P. Co.*, *supra*.

"The question whether there are substantial differences of condition reasonably suggesting the propriety of difference of treatment is primarily a legislative question and the legislative judgment thereon is not to be disturbed by the courts unless legislative action has clearly passed the boundaries of reason. Given the differences of condition above referred to and the field of legislative action is very broad; the legislative judgment is not to be interfered with merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law nor unless the court can confidently say that no reasonable ground can be discovered to support the classification.

"In approaching this question it is important to note at the outset that the license tax in question is levied in lieu of all other state taxes except taxes on real estate owned by the company. It covers all the contributions which the state demands from the company or its business except real estate taxes which are relatively small in amount. It is common knowledge that all of the great level premium insurance companies of the present day have vast reserve funds to protect their liabilities on policies, running up into the hundreds of millions of dollars and that these reserves are invested in interest bearing securities of which real estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real estate mortgages amounting

to \$153,562,654.39, of which only \$5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real estate mortgages for the year ending on said last named date amounted to \$7,446,393.10 and its income from bonds to \$3,172,489.58. These securities are all credits, i. e., personal property of an intangible character the situs of which for the purposes of taxation is in this state at the residence of the corporation.

"The power of the state under the constitution to levy occupation taxes in the shape of license fees in lieu of other taxes cannot now be questioned. *C. & N. W. R. Co. v. State*, 128 Wis. 589; *Nunnemacher v. State*, *supra*. Having determined on the license system of taxation for all life insurance corporations the state faced this situation: on one hand were the domestic level premium companies (of which the plaintiff is by far the most conspicuous example) having their reserves invested in securities or credits, all of which were not only taxable in Wisconsin but should, in justice to other taxpayers, contribute to the expenses of the government which created and protects their owners; and on the other hand were the foreign level companies also having great reserve practically none of which were taxable in Wisconsin and which were presumably subjected to just and adequate taxation in their respective domiciles. The essential difference was not the difference in residence but the difference in the location for taxing purposes of the reserves. This difference is certainly a very real one, germane to the subject of license fee taxation, and it plainly suggests, if it does not indeed demand, some substantial difference of treatment in the matter of the amount of the fees exacted. It would be indefensible to subject both classes to the merely nominal fee of \$300, thus allowing the great reserves of the local companies to escape taxation entirely, and it would be equally indefensible to exact of both classes a fee large enough to accomplish just taxation of the domestic company. The first course would practically exempt from taxation a very large volume of the state's taxable property, thus increas-

ing the burdens of all other taxpayers, and the second course would probably bar out every foreign life insurance company from the state, and either course would manifestly give to the domestic companies a very great advantage over foreign companies doing the same business.

"Plainly, the only course which could be followed if just taxation were to be approximated under the license system of taxation, was a course which should in some way compel the domestic company to make a fair contribution to the support of its home government, while recognizing and allowing for the fact that presumably every foreign company is compelled by its home state to do substantially the same thing.

"Whether this be done by personal property taxation, by income taxation or by license fee taxation was, we think, a question for the state to decide. We are unable to say that the state has not acted within the bounds of reason in fixing the license fees in the present case. It seems quite certain that a personal property tax would have exacted far larger contributions from the plaintiff to the public revenues than the license fee provided by this law.

"It is not to be expected that any precedent exists exactly on all fours with the present case but we think it clear that the principle upon which the classification in question is based has been approved in a number of cases decided by the federal supreme court in recent years. *Pacific Exp. Co. v. Seibert*, 142 U. S. 339; *Kidd v. Alabama*, 188 U. S. 730; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563.

"The conclusion reached on this branch of the argument renders it unnecessary to consider at length the question whether the law is in any respect aided by the retaliatory feature. Retaliatory laws have been held valid by the federal supreme court (*Phila. F. A. v. New York*, 119 U. S. 110), and we find no necessity for considering the question as to the practical effect of that feature in the present law. Any effect which it may have must

of course be in the direction of lessening the disparity in treatment of which the plaintiff complains in the present case." (Trans. pp. 4-6.)

In the opinion on the amended complaint the court reaffirmed these conclusions and overruled plaintiff's contentions, specially urged upon the amended complaint in opposition to the above quoted holding of the court, to the effect that the license fee exacted of plaintiff was more than it would have been required to pay under the former system of property taxation as applied to credits (plaintiff claiming that it would be entitled thereunder to deduct its reserve liabilities) and was more than would be exacted of it if taxed as other corporations under the present state Income Tax Law. The court said:

"The great disparity between the taxation of foreign and domestic level premium companies is very strongly urged and said to be so great as to be manifestly uneconomical and arbitrary. In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the state with regard to the taxation of such property, its liabilities to policyholders, i. e., the present value of its outstanding policies valued as required by law, which is about ninety per cent of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the three per cent license for requirement.

"We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as 'shall equal the amount of bona fide and unconditional debts by him owing.' This provision

was repealed by the income tax law which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Session Laws 1911, chapter 658.

"It seems entirely clear that the liability to policyholders which the plaintiff refers to is not in any sense an 'unconditional debt' and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

"As to the contention that if the plaintiff were taxed under the income tax system its tax burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system." (Trans. p. 52.)

In answer to plaintiff's claim of unlawful discrimination between it and fraternal societies, the state court held:

"This brings us to the contention that there is unlawful discrimination between level premium companies and fraternal benefit associations having lodge organizations which, under the terms of the law are exempted from the payment of any license fees. We do not feel that we should be justified in consuming any considerable amount of time or space in meeting this contention.

"That there is much difference of condition between the great level premium company with its great reserves and the ordinary fraternal benefit association can not be questioned. That the differences are such as to justify classification and difference of treatment so far as license taxation is concerned seems to us quite evident. The level premium company is purely a business concern;

the true fraternal benefit association is a banding together of many groups of neighbors primarily for social purposes but with the further idea of rendering mutual help in misfortune, sickness or death and inculcating the principles of brotherhood among the members. Such associations have no great expense account, they conduct the insurance feature of their organization at comparatively small cost and they have no such immense volume of reserve funds. Probably the lodge organization is their most marked differentiating characteristic. It is this characteristic which the legislature has chosen as decisive of their character, and we do not feel that we can say that the choice was made without reason. It avails not to say that there may be some instances where the lodge organization is almost or quite a pretense and the supposed fraternal association really approaches very closely to an insurance company. Nearly all classification possesses this defect. Individual cases near the border line on either side often present no differences worthy of notice but this does not invalidate the classification. It is the class, considered broadly as a class, which must possess the substantial differences suggesting the propriety of different legislative treatment, not every individual of the class. The principle is familiar.

"This state has recognized the distinct and exceptional character of fraternal associations and treated them as forming a class which should be subject to its own legal code since 1889 and still continues to do so. Wis. Stats. 1913, sec. 1956, *et seq.* The brief of the state informs us that the laws of forty-two states recognize the same distinction and that twenty-nine of these states have specified the lodge system as one of the distinguishing features of such organizations. We have not verified all of the citations but have no doubt of their substantial accuracy. We see no reason to doubt that the differences between these organizations as a class and level premium insurance companies as a class are so real and substantial as amply to justify classification. This conclusion receives support

in the case of *German Alliance Ins. Co. v. Kansas*,
233 U. S. 389." (Trans. pp. 6-7.)

On plaintiff's objections to the discrimination or classification made by the statute in favor of assessment and stipulated premium plan companies, the court referred to statements by insurance writers quoted on plaintiff's brief showing differences between assessment and old line companies. (Trans. pp. 7-8.) The court calls attention to the failure of assessment insurance, to the legislation of the state requiring the adoption of the stipulated premium plan by assessment companies and finally prohibiting this form of insurance business in the state altogether, except only as to three foreign assessment companies doing business in the state in 1907, when the law was passed, and of which only one now survives. The court, in conclusion on this feature of the case, said:

"There were but three foreign assessment companies doing business in the state in 1907 and there is said to be but one now. This company must, of course, be doing business on the stipulated premium plan and must constitute the entire class. The reasons already given for upholding classification as between domestic and foreign level premium companies apply with greater force to the classification as between domestic level premium and foreign assessment or stipulated premium companies." (Trans. p. 9.)

ARGUMENT

Before the constitutional questions raised against the license fee statute can be judiciously considered, it is obviously necessary to investigate and determine the peculiar character of the tax thereby imposed and its legal considerations and results. Accordingly, we will submit our brief of the argument under the following main propositions:

I.

The license fee is an excise or privilege tax imposed as a condition of doing a business of life insurance in the state and is also an exaction in lieu of personal property and other ordinary taxes, except taxes on real estate.

II.

The license fee is not a burden or restraint upon interstate commerce in violation of the Commerce Clause.

III.

The classifications, discriminations or exemptions made by the license fee statute are not arbitrary or unwarranted or otherwise in contravention of the Fourteenth Amendment.

I.

The License Fee is an Excise or Privilege Tax Imposed as a Condition of Doing a Business of Life Insurance in the State and is also an Exaction in Lieu of Personal Property and Other Ordinary Taxes, Except Taxes on Real Estate.

We are in accord with counsel for the plaintiff in designating the license fee involved in this case as a "privilege tax," "excise tax" or "occupation tax." For purposes of general designation or classification these terms are appropriately descriptive of this license fee. It is, however, to be understood and appreciated that the license fee here has an important incident not commonly found in taxes of the sort usually denominated privilege or occupation taxes. The license fee involved in this case and as applied to the plaintiff is not merely a privilege or occupation tax or excise imposed upon and exacted of the plaintiff, as a condition of the consent or permission of the state to the plaintiff to transact a business of life insurance in the state, but it is, moreover, and in addition to being such an excise or occupation tax, *an exaction in lieu of ordinary personal property taxes and in lieu of ordinary income taxes*. In a sense it is, in addition to being an occupation tax for the privilege of transacting a life insurance business in the state, a privilege tax imposed upon the plaintiff for the privilege of exemption, secured to the plaintiff under the laws of the state upon payment of such license fee, from ordinary personal property and ordinary income taxation.

That such is the character of this license fee appears plainly from the license fee statute and other statutes

affecting the liability of plaintiff and other like domestic corporations for taxes to the state or to its municipal subdivisions. Thus the license fee statute, section 51.32, formerly sections 1220 and 1220b, provides (*italics ours*):

"Every company, corporation or association transacting *the business of life insurance* . . . shall . . . pay into the state treasury as an annual license fee for transacting *such business* the amounts following:

" . . .
"(4) Such license, when granted, shall authorize the company, corporation or association to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose . . .,"
etc.

Section 1947 provides:

"3. No such corporation shall transact *any business of insurance*, until all the following conditions shall be complied with:

" . . .
"5. No life insurance corporation whatever shall do any business in this state, . . . in receiving . . . *applications for life insurance* . . . until it shall have first procured a license from said commissioner *authorizing it to issue policies of insurance in this state* and have paid therefor the license fee required to be paid by section 1220 . . ."

The statutes relating to general property taxation and exempting certain classes of property from such general taxation have long provided in section 1038 for the exemption of the personal property of insurance companies, thus:

"The property in this section described is exempt from taxation, to wit:

"• • •

"(13) All the personal property of all insurance companies that now or shall be organized or doing business in this state."

Section 1038, Stats. 1878; section 1038, Ann. Stats. 1889; section 1038, R. S. 1898; section 1038, Stats. 1913.

This policy of the state to exempt from general taxation life insurance companies paying license fees directly into the state treasury under section 1220, was carried forward into the state Income Tax Law upon its enactment in 1911 by the following provision:

"Section 1087m—5. 1. There shall be exempt from taxation under this act income as follows, to wit:

"• • •

"3. Income derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes, and such persons shall continue to pay taxes and license fees as heretofore."

The decision of the state court in this case expressly acknowledges and, for consideration in this court, establishes this dual character of the license fee here involved in the following language:

"It is clear that this so-called license fee is a privilege or occupation tax, and that, while it is not subject to that clause in the state constitution which requires the taxation of property to be uniform (section 1, article VIII) it is subject to the general equality clause of the state constitution and to the clause guaranteeing the 'equal protection of the laws' contained in the Fourteenth Amendment of the federal constitution." (Trans. p. 4.)

"In approaching this question it is important to note at the outset that the license tax in question is levied in lieu of all other state taxes except taxes on real estate owned by the company. It covers all the contributions which the state demands from the company or its business except real estate taxes which are relatively small in amount." (Trans. p. 5.)

The practice of imposing a license fee not only as an excise or occupation tax but as a privilege tax or exaction in lieu of ordinary taxes is a very old one in the taxation system of the state of Wisconsin and is one well recognized in the decisions of the state court long before the enactment of the license fee statute here involved and since.

Milwaukee & Mississippi R. Co. v. Supervisors of Waukesha Co., 9 Wis. 431;

Kneeland v. Milwaukee, 15 Wis. 454;

Wis. Central R. Co. v. Taylor Co., 52 Wis. 37;

State v. Railway Cos., 128 Wis. 449, 491, 496;

Nunnemacher v. State, 129 Wis. 190, 219.

The cases above cited down to *State v. Railway Cos.*, *supra*, relate to the system which obtained in Wisconsin for some fifty years of taxing railroad companies by license fees measured by a percentage upon their gross earnings, such license fee being in lieu of all ordinary property taxation. In the last mentioned case it became necessary to consider and determine the character and validity of such a license fee tax and the earlier decisions above cited are there referred to and reaffirmed. Speaking of the holding in these earlier cases, which dealt with the railroad license fee law enacted in

1854, the court, in *State v. Railway Cos.*, *supra*, said (italics ours):

"It was that the law was constitutional because it was legitimate to exempt a class of property from taxation and to do it *upon condition of the owner's paying a stated compensation 'to the treasurer of the state for the use of the state' in lieu thereof.* Here, in 1881, we find the most emphatic declaration that the basis of the former decision was that the early law did not deal with the imposition of taxes such as are mentioned in the constitution, but with *exemptions therefrom in consideration of the rendition of an equivalent for the privilege.*" (128 Wis. 491.)

Further, in the same opinion the court said that the legislature in amending the license fee law had preserved

"the feature of compensation to the state *as an equivalent for exemption from ordinary taxation as well as compensation for the privilege of operating the road.*" (128 Wis. 496.)

It clearly appears therefore that the statutes and also the decisions of the state court, both in the instant case and in prior cases, recognize and establish the character of the license fee or tax here not merely as an occupation tax for the privilege of doing business in the state, but

"as an equivalent for exemption from ordinary taxation as well as compensation for the privilege."

It is fundamentally important in the consideration of this case to have at the outset a correct conception of this license fee, including the considerations for and upon which payment of it is exacted and the results of payment or nonpayment of the fee. These considera-

tions will determine many of the questions which are raised and argued as bearing on the validity of the tax both under the Commerce Clause and under the Fourteenth Amendment.

It is not only quite plain, but it is settled by the decision of the state court, that aside from its character as an exaction in lieu of personal property taxes, the license fee here is an occupation tax enacted in consideration of the state's consent to the doing by the plaintiff of a life insurance business in the state of Wisconsin. Payment of the license fee entitles the plaintiff under the statute

- (1) to transact that business in the state and
- (2) to exemption from personal property taxation.

Failure to pay the license fee results in

(1) nonconsent by the state and prohibition to the plaintiff of the right to transact a life insurance business in the state and

(2) in the plaintiff's being liable for taxation under the laws of the state either upon its personal property as such or upon its income as other domestic corporations.

Counsel on their brief and in connection with the argument that the license fee is a condition of the plaintiff's right to engage in interstate transactions involving the investment of its funds refer to section 1947, subsection 5, and to section 1948. In view of the express provisions of the statutes above quoted and of the decision of the state court in the instant case and in prior cases, it is plain, however, that the prohibition of the statutes to a life insurance corporation to do business in the state until the license fee is paid and other provisions of the state laws complied with must be limited and construed to prohibit only the doing of a life insurance business. The state court in this case

held that the payment of the license fee is not a condition precedent to the right of plaintiff to transact its investment business, "that the law places no burden upon that business" saying (*italics ours*):

"It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. If it does not do so, *it may transact all the investment business which it desires to transact without paying any license fee under this law.*" (Trans. p. 10.)

This holding of the state court in the instant case is in strict accord with prior decisions of that court relating to license fee statutes of the state applying to life insurance companies.

Thus, a law requiring a license fee of life insurance companies and a license fee of accident insurance companies is held to require two fees of a company doing both life insurance and accident insurance business.

Travelers Ins. Co. v. Fricke, 94 Wis. 258;

Travelers Ins. Co. v. Fricke, 99 Wis. 367;

State ex rel. Fidelity & Casualty Co. v. Fricke,
102 Wis. 107, 115.

On the other hand, an insurance company is not required to obtain a license as such, under the insurance laws of the state, in order to invest or lend its funds in this state and to take and enforce securities for such loans in this state.

Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387.

In the opinion in that case the court, speaking through Chief Justice Ryan, said:

"Insurance companies in other states are bound by statute to certain prescribed compliances, in order to authorize them to transact the business of insurance in this state. But compliance with that statute is not necessary to enable them to take securities in this state for debts due to them by residents of the state." (Pp. 387-388.)

The holding of the highest court of the state that the payment of the license fee is not a condition precedent to the right of plaintiff to transact business other than that of life insurance, being a construction of the state statutes merely and being in accord with long established state practice as reflected in both the legislation and court decisions of the state, is, we submit, binding on this court.

II.

The License Fee is not a Burden or Restraint upon Interstate Commerce in Violation of the Commerce Clause.

One of plaintiff's main contentions, and we suspect its main reliance, in this case is that the license fee statute is unconstitutional, as imposing a burden upon interstate commerce in violation of the Commerce Clause, section 8, article 1 of the federal constitution. To this proposition counsel for the plaintiff devote two major divisions of their brief.

With the idea presumably of "putting the best foot forward," this contention is argued, first, on the ground that the part of plaintiff's business relating to the lending or "investing" of its reserve funds, involving, as it does, interstate transactions and communications, is interstate commerce. As to this part of the plaintiff's business it is claimed that the rule of the *Textbook* (217 U. S. 91) and *Lottery* (188 U. S. 321) *Cases* is applicable and that under these cases such transactions should be held to constitute commerce. There is argument, also, that the long line of decisions in this court, reviewed and reaffirmed in the *New York Life Case* (231 U. S. 495), should be abandoned and that the court should hold in this case that the plaintiff's insurance business is commerce. Relying, however, primarily upon the so-called "investment branch" of its business being held to be interstate commerce, plaintiff's counsel argue that the license fee is a direct burden on that business.

In presenting our views in opposition to the plaintiff's contention under the Commerce Clause, we shall not attempt to follow the order of argument as presented on

the plaintiff's brief. Some of the general principles stated on the plaintiff's brief we will not controvert. Some of them we regard as having no application in the instant case. Our argument upon this branch of the case will be based upon the following propositions and presented in the following order:

1. The business of life insurance is not commerce.
2. The insurance business is the only business for which a license is required to be obtained or a fee paid under the license fee statute.
3. The part of plaintiff's business pertaining to the lending or investment of its reserve funds is merely a part or incident of plaintiff's insurance business, which is not commerce, and in that situation the question does not arise whether such a business, considered independently and not as an incident of the life insurance business, is commerce.
4. The plaintiff's "investment" business, so-called, is not taxed or burdened by the license fee statute.
5. The license fee in this case is not even measured upon interstate transactions.
6. Furthermore, this court has thus far refused to hold that transactions of the character of those which comprise plaintiff's so-called "investment" business constitute commerce.
7. The license fee, being a tax imposed upon a domestic corporation for purely local privileges and a tax, therefore, clearly within the jurisdiction of the state to impose, may lawfully be measured by reference to things not taxable by the state.

While the decision of the state court, which we ask this court to affirm is expressly rested, as to this interstate commerce-question, upon part only of these propo-

sitions, we feel that a full consideration of all of them by this court will lead to a firmer conviction of the correctness of the result reached by the state court. We assume, of course, that, in accordance with its repeated declarations, this court will affirm the decision below if satisfied that that decision is correct, whether it be in accord with the reasons given by the state court or not.

McClung v. Silliman, 6 Wheat. 598;

Davis v. Packard, 6 Peters 41;

Erwin v. Lowry, 7 How. 172;

Sullivan v. Iron Silver Mining Co., 143 U. S. 431.

1. *Business of Life Insurance is not Commerce.*

It is with becoming hesitancy that counsel for the plaintiff ask a reconsideration of this question here. Their request is unsupported except by suggestions of the possible expediency of clothing Congress with power to regulate the insurance business under the Commerce Clause. Counsel do not seem to appreciate the gravity of their proposal to thus deprive the states of all power over their insurance corporations, although this court has repeatedly, forcibly and recently pointed out the danger and unwisdom of such a course. Counsel have not apparently concerned themselves to consider whether there may not well be found in other federal powers ample authority for any insurance undertakings which Congress may desire to inaugurate without recourse to the Commerce Clause.

We take it that this question is settled here by the unbroken line of authorities reaching back half a century, and that this court will not again, either "in deference to the earnestness of counsel" or in response to the im-

portunities of insurance corporations, reconsider its established and accepted determination that insurance is not commerce:

New York Life Ins. Co. v. Deer Lodge County,
231 U. S. 495;

Paul v. Virginia, 8 Wall. 168;

Ducat v. Chicago, 10 Wall. 410;

Liverpool Ins. Co. v. Mass., 10 Wall. 566;

Philadelphia Fire Assn. v. N. Y., 119 U. S. 110;

Hooper v. California, 155 U. S. 648;

Noble v. Mitchell, 164 U. S. 367;

New York Life Ins. Co. v. Cravens, 178 U. S. 389;

Nutting v. Mass., 183 U. S. 553.

Counsel for the plaintiff are wrong in the view that the *New York Life Case* (231 U. S. 495), reaffirming, upon an extended review of the previous cases, the determination of this court that insurance is not commerce, was rested on *stare decisis*. The opinion in that case, while pointing out the great mischief which would follow a departure from the established ruling (p. 502), upon a review of the former decisions to show that they hold definitely and unequivocally that insurance is not commerce (pp. 503-508), *expresses in most positive language the unqualified satisfaction of the court with that established determination* (p. 508).

But the attempt is made here by pleading and by argument, exhibiting multitudinous interstate transactions, communications and intercourse, and emphasizing the monetary value and commercial use of plaintiff's policies of insurance, to avoid application of the settled rule in this case. They set up most elaborately the plaintiff's manner of doing business, its large interstate correspondence with its insurance agents, its medical examiners

and its policyholders, its extensive interstate transmission through the mail and by express of reports, papers, documents, moneys and securities.

All this is but trite repetition of similar showings made for a like purpose in the *Cravens Case*, *supra*, and in the *New York Life Case*, *supra*. The manner of conducting plaintiff's life insurance business is pleaded in this case in substantially the same form and effect as the business of the *New York Life* was stated in the court's statement of that case (231 U. S. 499-501).

Such considerations, this court holds, do not make the insurance business commerce and do not avoid the application here of the well-settled determination that such business is not commerce. In the opinion by Mr. Justice McKenna in the *New York Life Case*, *supra*, this court said (*italics ours*):

"Nor does the character of the contracts change by their numbers or the residence of the parties. The latter is made much of in this case. It was made much of in the Cravens Case. The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents, but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the states.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character" (pp. 508-509).

And further:

"The number of transactions does not give the business any other character than magnitude. If it

did, the department store which deals with every article which covers or adorns the human body, or, it may be, nourishes it, would have one character, while its neighbor, humble in the variety and extent of its stock, would have another. *Nor, again, does the use of the mails determine anything.* Certainly not that which takes place before and after the transactions between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. *That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another, to paraphrase Paul v. Virginia.* Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

"It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument was anticipated in Paul v. Virginia, citing Nathan v. Louisiana, where, as we have seen, a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the states or with foreign nations.

"It is contended that Paul v. Virginia and the cases which follow it must be limited, as it is contended 'the facts herein did limit them, to intrastate, not interstate, contracts,' and that if they be not so limited the Lottery Case (Champion v. Ames) 188

U. S. 321, [47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561], and *International Textbook Co. v. Pigg*, 217 U. S. 91 [54 L. ed. 678, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103], cannot stand.

"The basis of this contention necessarily is the insistence that the contracts in *Paul v. Virginia* and the succeeding cases were intrastate contracts. But this is a false characterization of the contracts. The decision of the cases is that *contracts of insurance are not commerce at all, neither state nor interstate*. This is the obstacle to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it *by detailing the manner of conducting its business as demonstrating that its policies are interstate contracts*. We have replied to the attempt and shown that *its manner of business has no such effect*. It follows necessarily, therefore, that neither the *Lottery Case* nor the *Pigg Case* impugns the authority or the application of the cited cases. They, the *Lottery Case* and the *Pigg Case*, were concerned with transactions which involved the transportation of property, and were not mere personal contracts" (pp. 509-511).

What was said by the court in that case is precisely applicable here and precludes entertaining in this case the suggestion of counsel that the determination that insurance is not commerce be reconsidered or that it be held not to apply to the plaintiff's insurance business because of plaintiff's manner of conducting that business.

In Wisconsin, as generally in all the states, the determination of this question by this court has been accepted and relied upon in the enactment of legislation. The state court, not only in the present case but in previous cases, has followed and relied upon it as determined by

this court and as a settled proposition of the constitutional law.

State v. U. S. Mutual Accident Assn., 67 Wis. 624, 629-630;

Stanhilber v. Mut. Mill Ins. Co., 76 Wis. 285;

State ex rel. Covenant M. B. Assn. v. Root, 83 Wis. 667, 680-681.

We submit that we are entitled to assume that there is no occasion to reargue this proposition in this court.

2. *The Insurance Business is the only Business for which a License is Required to be Obtained or a Fee Paid under the License Fee Statute.*

We will not repeat under this proposition what we have said upon the nature of the license fee tax, Part I of this brief, in which we have shown that, both by the statutes and by the decisions of the highest court of the state, the payment of the license fee and the obtaining of a license under the license fee statute is *required only for the transaction of the plaintiff's insurance business*. This proposition has been conclusively determined as a matter of construction of local law by the highest court of the state in its decision in this case that the license fee statute merely "*requires the payment of a license fee for transacting life insurance business in this state*," and that if plaintiff does not transact such business in the state it may transact any other business which it claims a right to "*without paying any license fee under this law*" (Trans. p. 10).

This construction of the state law by the state court is not mere declamation nor is it a construction original in

this case or adopted for the purposes of this case. It is the practical construction that has obtained uniformly in the administration of the law.

It is the construction that had previously been established by the state court

(1) in holding companies doing insurance business in the state subject to the license fee and also

(2) in holding that a life insurance company not doing insurance business in the state is not subject to compliance with the insurance laws of the state to enable it to engage in other business therein, such as lending its funds and taking and enforcing security for such loans.

Travelers Ins. Co. v. Fricke, 94 Wis. 258;

Travelers Ins. Co. v. Fricke, 99 Wis. 367;

State ex rel. Fidelity & Casualty Co. v. Fricke,
102 Wis. 107, 115;

Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387.

It is an authoritative construction by the highest court of the state, binding on the administrative officers and on the courts of the state in the future administration of the law. It is a deliberate and considerate construction made upon full argument to that court on the language of the license fee statute and on all related statutes of the state—statutes with which that court is entirely familiar.

Counsel, we submit, are in the wrong forum in attempting to reargue the construction of the license fee statute here. The construction placed upon it by the highest court of the state is binding on this court.

United States Exp. Co. v. Minnesota, 223 U. S.
335, 342;

Jacobson v. Massachusetts, 197 U. S. 11, 24;

New York Life Ins. Co. v. Cravens, 178 U. S. 389, 395;

Orr v. Gilman, 183 U. S. 278, 288, 289-290;

Waters Pierce Oil Co. v. Texas, 177 U. S. 41, 42-43.

Counsel for the plaintiff on their brief suggest that by reason of the language of an allegation of the complaint, which they quote from *Trans.* p. 37, fol. 194, the practical construction of the statute must be taken as requiring the license to be obtained and the license fee to be paid as a condition precedent to the right of the plaintiff to transact "*any business in the state*," including the plaintiff's so-called "investment business." This is on the theory that our demurrer admits the allegation referred to, construed as counsel now seek to construe it. We think that, in the light of the statutes and in view of the entire complaint, the allegation referred to is open to construction; that it must be construed against the pleader and should not be construed as counsel suggest. *No such construction of it was suggested to or adopted by the state court.*

Rather, this allegation that plaintiff was notified that, unless it paid a fee or tax in the amount named, the commissioner of insurance would withhold plaintiff's license "and would refuse to permit said plaintiff * * * to transact any business in the state" should be construed as it was apparently construed below and in accordance with the language of the statutes to mean "*any business of life insurance*"—sec. 51.32 (3)—and to refer to the only license which the commissioner had authority to withhold, i. e., a license "authorizing it to issue policies of insurance in this state"—sec. 51.32 (5).

That the payment of the license fee is a condition pre-

cedent to the obtaining of *such a license* is certainly the gravamen of plaintiff's complaint. No license to do any other business is defined or provided for in the statutes. Authority to engage in its business other than that of issuing policies of life insurance plaintiff has by its corporate charter. If it were the gravamen of plaintiff's complaint that it is denied, except upon obtaining a license and paying the license fee under the license fee statute, to transact its so-called investment business either in the state or elsewhere, the plaintiff has won its case in the highest court of the state, *which holds that plaintiff may transact such business without complying with the license fee statute*. That construction is binding upon the commissioner of insurance and if that official should fail to follow it in his administration of the law, plaintiff can, of course, on the decision below, obtain a mandatory writ out of the state court, specifically requiring the commissioner of insurance to act in accordance with that ruling and not otherwise.

3. *The Part of Plaintiff's Business Pertaining to the Lending or Investment of its Reserve Funds is merely a Part or Incident of Plaintiff's Insurance Business.*

In this view, the "investment branch" so-called, of plaintiff's business is *not entitled to separate consideration but should be treated as part and parcel of plaintiff's insurance business*. As it seems to us, the plaintiff, both on its complaint and on the brief of its counsel, is at great pains to show that this loan or "investment" business is *but a necessary incident of its insurance business*. True, it is of large magnitude but, as said in effect

by this court in the *New York Life Case*, *supra*, the magnitude of the business, the number of contracts or the residence of the parties do not determine the character of the business. This loan business is still an incident, although large, of an insurance business several times larger. As for mere magnitude, the following items from the complaint make the comparison:

Total insurance in force (Trans. p.	
17) -----	\$1,147,273,523.00
Total of policy loans, mortgage	
loans, and bonds (pp. 22, 24, 25) --	271,763,902.41
Total insurance premiums collected	
(Trans. p. 17) -----	40,421,263.23
Total interest collected on policy	
loans, mortgage loans and bonds	
(Trans. pp. 36, 37) -----	12,782,691.52

The complaint shows that the funds loaned or invested are funds received in the first instance *as insurance premiums*: that they are funds accumulated and held and required to be held as reserves *to meet policy obligations* and that their investment is regulated by law *with a view to security for that purpose*. It is alleged that the purchase of bonds with a part of the reserves is dictated *by necessities of the insurance business* in order to have readily convertible securities with which to meet demands of policyholders for the surrender value of their policies and the like. The policy loans are made upon security of the plaintiff's policies of insurance and *are expressly provided for in the policies*. It is alleged that the accumulations from the lending and investing of these funds *enter into the calculation of plaintiff's rates of premium and of the terms of the insurance policies issued by it and that without ability to so lend and in-*

vest its funds "the conducting of the life insurance business by plaintiff would be wholly impossible." (Trans. pp. 21, 22, 25, 29, 30.) Counsel for plaintiff on their brief amplify these allegations by argument that these "investment transactions are essential to the business" of life insurance.

If these "investment transactions" are thus indispensable incidents of the insurance business, thus inextricably interwoven therewith, why are they not simply part and parcel of this insurance business? Why if these allegations of the complaint and claims of counsel be true, is this court in this case called upon to consider them as though constituting a separate, independent business, entitled to separate classification and status under the Commerce Clause? Are not these transactions here merely incidents, just as was held in the *New York Life* and the *Cravens Cases*, *supra*, of the interstate transactions exhibited there in an effort to give interstate commerce character to the insurance business? The interstate transmission of correspondence, documents, notes, bonds or funds in this case is here exhibited as a necessary incident of the insurance business just as was the interstate transmission of correspondence, applications, policies and premiums collected in the *New York Life Case*.

In that case it was held, in effect, that such transactions were but incidents, not entitled to be considered as apart from the insurance business of which they were such incidents and not efficient to give to that business a status as interstate commerce. In that case the tax was for the privilege of doing a life insurance business in the state and was measured upon premiums collected to meet policy obligations and defray the expenses of the business, such premium receipts being collected and re-

ceived through interstate communication and transmission. In this case the tax is for the privilege of doing a life insurance business in the state and is measured in part upon interest income collected to meet policy obligations and defray the expenses of the business, such interest receipts being collected and received through interstate communication and transmission. In both cases the interstate transactions are conducted for and in behalf of and as an integral and incidental part of an insurance business which is not commerce.

We submit that the reference in this case to such incidental transactions in measuring in part the tax for the privilege of engaging in the insurance business in the state does not here, as it did not in the *New York Life Case*, efficiently raise a question under the Commerce Clause. If these loan transactions be regarded as an inseparable part and incident of the insurance business they are not commerce or a part of commerce and there is an end of the case so far as the Commerce Clause is concerned.

If these incidents may be considered apart and treated as constituting a separate business, having character and status of its own, as the state court considered them and as plaintiff's counsel find it necessary for the major part of their argument under the Commerce Clause to treat them, the first and most obvious answer to their contention is that the license fee statute does not require a license to be obtained or a fee to be paid for the doing of that business. As is well said in the opinion below (*italics ours*) :

"If, as argued by the plaintiff, the investment business be a separate business and a form of interstate commerce, the answer is that the law places no burden upon that business. It requires the pay-

ment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. *If it does not do so, it may transact all the investment business which it desires to transact without paying any license fee under this law*" (Trans. p. 10).

4. *The Plaintiff's "Investment" Business, So-called, is not Taxed or Burdened by the License Fee Statute.*

That the plaintiff's "investment" business is not directly or in legal contemplation taxed or burdened by the license fee statute is conclusively settled by the decision of the state court. This is said with full appreciation and full acknowledgment of the right and duty of this court to disregard mere forms and to look to the substance of things in order to determine for itself whether federal powers under the constitution are invaded by state laws.

Freely conceding, as we do, that power of this court, it is our position that in the instant case there is no occasion for the exercise of that power for the reason that, *in the nature of the case, the state court's decision determines not merely the form but the legal effect and the incidence of the burden of the tax and that determination must control its practical administration and enforcement.* Stated otherwise, the decision of the state court that the plaintiff has a perfect, lawful right to transact its "investment" business "without paying any license fee under this law" is *conclusive as to that right* and hence, as to the practical operation and results of the statute so far as any direct burden upon the plaintiff's "investment" business is concerned.

But it is urged by counsel that the license fee statute

nevertheless operates as a burden upon the plaintiff's "investment" business, and cases are cited to the proposition that this court will look to the practical operation of the law and that the state may not have a law which even indirectly substantially burdens interstate commerce. Counsel, it seems to us, quite fail to show at all clearly wherein this license fee statute imposes any substantial burden, even indirectly, upon the plaintiff's interstate transactions which are claimed to constitute commerce. True, counsel contend that the "investment" business is a necessary incident of plaintiff's insurance business. Let that be assumed. It does not tend to support the claim that the license fee burdens the "investment" business. To support such claim the *converse of that assumption* would have to appear.

Nowhere do counsel show, as of course they cannot, that the right to engage in the life insurance business in the state of Wisconsin (for which the license is required) is essential to the conduct of plaintiff's so-called "investment" business. Plaintiff obviously could discontinue the issuance of policies of insurance altogether and still continue to transact its "investment" business, consisting of the lending and investment of its reserve funds and its premium income from policies heretofore issued. It is a common thing for insurance companies to withdraw from a particular state or states and discontinue temporarily or permanently the issuance of insurance policies therein. Several of the larger insurance companies of the country did so withdraw from the state of Wisconsin in the year 1907 and discontinued their insurance business therein for a period of several years.

Cases cited by counsel in which this court has held state taxes or license requirements not in form directly upon interstate commerce invalid under the Commerce

Clause as imposing burdens upon interstate commerce, are clearly distinguishable. These cases may be classified as follows:

Cases in which tax or license exactions were attempted to be imposed upon common carriers, whose business was concededly commerce, the tax being determined directly upon the volume, value or proceeds of the common carrier service including interstate commerce or the license being required as a condition precedent to the right to do business including interstate commerce business of the common carrier.

Crutcher v. Kentucky, 141 U. S. 47, 48;

St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350, 368-370;

Galveston etc. Ry. Co. v. Texas, 210 U. S. 217;

Meyer v. Wells Fargo & Co., 223 U. S. 298, 300;

Harmon v. Chicago, 147 U. S. 396;

Saulte Ste. Marie v. International Transit Co., 234 U. S. 333;

State Freight Tax Case, 15 Wall. 232;

Philadelphia & S. Mail S. S. Co. v. Penn., 122 U. S. 326.

Cases in which state taxes upon common carriers engaged in interstate commerce were measured upon property outside the state and used in interstate commerce (which is not done here) the necessary effect of which was to burden the interstate commerce business.

W. U. Tel. Co. v. Kansas, 216 U. S. 1, 30-31;

Pullman Co. v. Kansas, 216 U. S. 56, 63;

Ludwig v. W. U. Tel. Co., 216 U. S. 146, 163;

Fargo v. Hart, 193 U. S. 490;

Atchison T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 285.

Cases in which state taxes or license requirements were attempted to be exacted for the privilege of transacting business consisting of the importation, sale and delivery in interstate or foreign commerce of sound articles of commerce.

International Textbook Co. v. Pigg, 217 U. S. 91, 106; "Books, apparatus, and papers."

Looney v. Crane Co., U. S. Adv. Ops. 1917 pp. 144, 145, 146-147; "Hardware, railway supplies, building materials, agricultural implements, etc."

Crew Levick Co. v. Penn., U. S. Adv. Ops. 1917 pp. 122, 123-124; "Goods, wares, and merchandise."

Neither the *Minnesota Rate Cases*, 230 U. S. 352, nor *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, cited by counsel, is applicable to support plaintiff's contention. *The Minnesota Rate Cases* as far as the interstate commerce question here is concerned, sustained the state's power to regulate the intrastate rates of railroads operating in the state, notwithstanding the "interblending of operations in the conduct of interstate and local business" (pp. 431-433) and nothing is said in the court's review of its prior decisions (pp. 400-402) from which it can be argued that the license fee here is a burden on plaintiff's investment transactions. The case of *Choctaw etc. R. Co. v. Harrison* did not deal with interstate commerce at all but only with an occupation tax of two per cent of gross receipts as applied to the receipts of the lessee, under lease from the government, received from the operation of a coal mine on Indian lands, operated by it as an agency of the government.

In *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, *St.*

Louis Southwestern Railway Company v. Arkansas, 235 U. S. 350, and *Kansas City etc. Railway Co. v. Botkin*, 240 U. S. 227, cited by counsel, the state laws were sustained against arguments similar to those offered by counsel, and these cases tend to confute and in no wise support their contention here. The *Botkin Case*, *supra*, was decided here between the two hearings below and was cited to the state court upon the reargument there. Of it the state court said:

"The interstate commerce feature of the case is reargued and the recent case of *K. C. R. Co. v. Botkin*, 240 U. S. 227 (decided February 21, 1916), is called to our attention as in conflict with the previous opinion in the present case. We have been unable to see in what respect the cases conflict" (Trans. p. 52).

5. The License Fee in this Case is not even Measured upon Interstate Transactions.

The interstate transactions pertaining to the lending and investing of plaintiff's funds, as exhibited by its complaint, consist of communications by mail and telegraph and transmission by mail and express of information, writings, documents, forms and securities, in the course of negotiation, consummation and acquisition of loans secured by assignments of policies of life insurance issued by the plaintiff, of loans secured by mortgages on real estate in other states and of bonds issued by states, municipalities or corporations. The purchase of a bond, of course amounts to the making of a loan. If it is a governmental bond it is a loan secured by pledge of public credit and repayment is enforceable by compulsory taxation. If it is a corporate bond it is se-

cured by mortgage or deed of trust of property of the corporation.

By the allegations of the complaint, the securities representing these loans, whether they be assigned policies of life insurance, real estate mortgages and related evidences of title or public or corporate bonds, are in each case transmitted to and taken into possession by the plaintiff at its home office in the state of Wisconsin. With possible exceptions in the case of bonds, the complaint shows that this is *required* to be done before the check is transmitted from plaintiff's home office to the borrower. It therefore appears by the complaint that these loans and these securities and evidences of title *are in each instance acquired by the plaintiff at its home office in the state before the funds are advanced and before interest thereon commences to accrue*. Nowhere in the complaint or on the brief of counsel is any claim made that the license fee is in any way measured or determined upon or according to the volume or number or value of these transactions or any of them. Nor could any such claim be maintained.

The complaint specifically sets forth the precise character and amount of the items upon which the license fee was measured under the law in this case (Trans. pp. 36-37). From an inspection of the tabulation of these items in the complaint, it appears that these items were, with the exception of Wisconsin premium receipts, *in every instance receipts in the nature of interest income*. (Item 7. Denominated discount is really an item of interest.) The bulk of these interest items and the only items specifically complained about by the plaintiff are the following:

Interest on real estate mortgages-----	\$7,446,393.10
Interest on bonds-----	3,172,489.58
Gross interest on premium notes, policy loans or liens, item 26 income	2,163,808.84
Total -----	\$12,782,691.52

It is plain that the license fee is measured *not in any degree upon the interstate transactions set up in plaintiff's complaint, but is measured only upon interest income earned and received by the plaintiff only after the interstate transactions pleaded are consummated and after the income producing securities are acquired and reduced to the possession of the plaintiff, at its home office in the state.*

Obviously, the plaintiff might in the year sell or exchange *all* of its security holdings without increasing the license fee measured upon its interest income from such holdings. Indeed, it might do so and multiply *ad libitum* its interstate investment transactions without increasing and even decreasing the amount of license fee which it would be liable to pay under this law. Plaintiff might, for instance, dispose of railroad bonds and acquire in lieu thereof municipal bonds which, because of the greater security back of them, might bear lower rates of interest and produce a less income, and thereby its liability for license fee under this law would be reduced notwithstanding that *more* investment business was transacted.

Counsel on their brief, p. 72, labor to exhibit a possible burden by the license fee upon the plaintiff's investment business in 1911. By a calculation, which assumes facts not pleaded and which could probably not be proved, it is computed that the license fee measured

on plaintiff's interest income for 1911 was measured upon interest received upon loans made in 1911 to the extent of \$27,000, or less than six per cent of the tax. Of course, it is not to be assumed, for it may be contrary to fact, that plaintiff's interest income was greater by any amount in 1911 by reason of its investment transactions of that year. This attempt of plaintiff's counsel to sustain their contention by such calculation serves, we submit, to demonstrate that *there is no necessary and no direct relation between the license fee imposed under this law and the number, volume or value of plaintiff's investment transactions, and that such transactions are in no direct or substantial sense burdened by this license fee.*

A license fee tax measured upon the interest income of securities acquired through interstate transactions and owned and held and having taxable situs in the state during the interest earning period by a resident of the state is no more a burden upon such interstate transactions than is the ordinary property tax upon tangible property which a resident may have brought into the state in interstate commerce and which he there owns and holds, a burden upon interstate commerce. If the license fee here were held to be a burden upon the interstate transactions of the plaintiff, then an ordinary state income tax measured upon income earned and derived from property owned and held by a resident, in the state, but which had been brought into the state in the course of interstate commerce, would be in contravention of the Commerce Clause.

Counsel refer also to the fact that some 95% of the plaintiff's interest income from policy loans, mortgage loans, and interest on bonds is collected by and transmitted to it from without the state, involving inter-

state communication and transmission. Never has it been held that the mere circumstance of the interstate transmission of the receipts precludes, because of the Commerce Clause, the measurement of a state tax upon the income composed of such receipts. Counsel cite no case to that effect.

The largest item of such receipts here consists of interest on real estate mortgage loans. If counsel's contention were allowed the state could not subject to ordinary income taxation profits derived by a resident from a deal in Wisconsin real estate consummated in the state if it happened that the sale was to a nonresident and the consideration was transmitted to the tax payer from outside the state.

Certainly the state is not precluded from subjecting the income of a resident to income taxation because the income includes receipts which have come to the hands of the tax payer through transmission from other states. If this were the law, then all that would be necessary to enable all residents of the state to escape income taxation would be to arrange to have money payable to them transmitted through a bank in another state. If that were the law then the *New York Life Case*, *supra*, was wrongly decided, because the tax in that case was measured upon receipts by the New York Life Insurance Company in New York from its policy holders in Montana. We submit that counsel's contention based upon the interstate transmission of these items of interest income refutes itself and is eloquent of the weakness of their contention under the Commerce Clause.

6. *This Court Has thus far Refused to Hold that Transactions of the Character of Those Which Comprise Plaintiff's So-called Investment Business Constitute Commerce.*

We will now consider the plaintiff's contention which counsel state at page 33 of their brief in the words of the late Mr. Justice Timlin, dissenting below, that

“• • • Carrying on a loan business involving the transmission of money and securities, with the necessary correspondence, instructions, vouchers and other writings, constitutes interstate commerce.” (Trans. fol. 133.)

In the opinion of the court below this question was passed over, as it was held that the license fee was not a burden upon or condition of the right to carry on this loan business. Of course, decision of the question here in accord with plaintiff's contentions is, in *any* view of the other points, essential to plaintiff's case under the Commerce Clause. On this point, we concede the claims of counsel that these loan transactions are nearly all interstate and that they constitute a necessary part of plaintiff's business. Nor will we take time or space to examine the several grounds of distinction anticipated and argued on counsel's brief, pp. 37-42, upon which we would not rely.

We have already considered this loan business as an incident merely of plaintiff's insurance business and, hence, not commerce. At this point, we invite attention to the inherent character of these transactions to show that, independently considered, they do not constitute commerce, state or interstate.

We have just considered under the preceding point the

inherent character of these interstate transactions and have shown that they consist solely of the negotiation, consummation and acquisition of loans of plaintiff's funds upon security of assigned policies of insurance, real estate mortgages or, in the case of bonds, secured by pledge of public credit or corporate property, and of communication and transmission by telegraph, mail or express of information, writings and documents in relation thereto. We maintain that such loan transactions are not and have never been held here to be commerce. Counsel for plaintiff cite no case in which transactions of this character have been held to be commerce. Finding no such authority they refer to cases dealing with other subject matter held to be commerce and argue that by analogy thereto, these transactions should be held in this case to be commerce.

Counsel's main reliance for support of their contention on this point is upon:

International Textbook Co. v. Pigg, 217 U. S. 91;

International Textbook Co. v. Peterson, 218 U. S. 664;

Lottery Case, 188 U. S. 321,

and the Blue Sky Cases:

Alabama etc. Transportation Co. v. Doyle, 210 Fed. 173;

Compton Co. v. Allen, 216 Fed. 537;

Bracy v. Darst, 218 Fed. 482;

Halsey v. Merrick, 228 Fed. 805;

Sioux Falls Co. v. Stockwell, 230 Fed. 236;

Geiger-Jones Co. v. Turner, 230 Fed. 233.

To which we oppose:

Nathan v. Louisiana, 8 How. 73;

United States Fidelity Co. v. Kentucky, 231 U. S. 394;

Williams v. Fears, 179 U. S. 270;
Ware & Leland v. Mobile Co., 209 U. S. 405;
Engel v. O'Malley, 219 U. S. 134;
New York v. Reardon, 204 U. S. 152, 161-162;
Standard Home Co. v. Davis, 217 Fed. 904, 915;
State v. Merrill, (Wash.) 144 Pac. 925;
Nelms v. Mortgage Co., 92 Ala. 157, 9 So. 141, 142;

also the Insurance Cases,

Paul v. Virginia to

New York Life Ins. Co. v. Deer Lodge Co., cited p.
45, *supra*,

and the refusal of this Court in the *Blue Sky Cases*, 242 U. S. 539, 559, 568, to approve the assertion of the lower courts, relied on by plaintiff, on the interstate commerce question.

Of the cases cited at pages 55-57 plaintiff's brief, it is sufficient to say that these are cases dealing with interstate transportation of sound articles of commerce:

Textbook Cases, 217 U. S. 91;

International Textbook Co. v. Gilliespie, 129 S.
W. 922;

Peterson v. Holteiser, 150 N. W. 934;

Davis v. Virginia, 236 U. S. 697;

Weber v. Freed, 224 Fed. 335;

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156
Fed. 1;

Cole Motor Car Co. v. Hurst, 228 Fed. 280;

U. S. v. U. Shoe Machinery Co., 234 Fed. 127;

Marinelli v. United Booking Offices, 227 Fed. 165;

Kansas City v. Seaman, 160 Pac. 1139,

or of persons, whose transportation is, of course, commerce:

Passenger Cases, 7 How. 283;

Covington Bridge Co. v. Kentucky, 154 U. S. 204;

White Slave Cases, 227 U. S. 308,

or the telegraph, a common carrier and instrumentality of commerce:

Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1;

Tel. Co. v. Texas, 105 U. S. 460;

Western Union v. Pendleton, 122 U. S. 347;

Richmond v. Tel. Co., 174 U. S. 761,

and, hence, none of them is in point to support plaintiff's contention that these loan transactions constitute commerce.

The Textbook Case

On this point counsel place great reliance upon the *Textbook Cases*, or *Case* (217 U. S. 91), for there is only one in which an opinion was written here, and that by a divided court. Now, of course that case does not deal with a loan business at all. We think, moreover, that it is not at all in point to support the plaintiff's contention here. As we read the *Textbook Case*, what was there held was no extension of the already well established proposition that interstate traffic in tangible things is interstate commerce. There is a distinction to be observed here between what was held in that case and what was said *arguendo* in the opinion. The statements which counsel seek to take from the opinion there, and apply to the case at bar to the effect that "intercourse" is commerce or that "information" is commerce, belongs rather to the discussion than to the decision in the *Textbook Case*.

The question in the *Textbook Case* was not whether mere intercourse or correspondence is commerce but whether the business of the *Textbook Company* which consisted of the selling, shipping, and delivering to persons in other states of informative writings, instruction papers, books and apparatus, was commerce. The Court,

referring to the *Telegraph Cases*, used the following language, upon which counsel rely:

"If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business." (217 U. S. 107.)

In saying "that intercourse or communication between persons in different states by means of correspondence through the mails, is commerce," we think the Court clearly intended that statement to relate *only to the facts of that case*, for the opinion proceeds in the next sentence to state the conclusion *as applied to the business of the Textbook Company*, thus (*italics ours*):

"In our further consideration of this case we shall therefore assume that *the business of the Textbook Company*, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature." P. 107.

Thus the *holding* of the case and all, we think, the case was ever intended to hold is quite accurately stated in the second syllabus paragraph, as follows (*italics ours*):

"Commerce is conducted among the states, within the meaning of the Federal Constitution, by a corporation engaged in imparting instruction by correspondence, whose business involves the solicitation of in other states by agents, who are also to collect

and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers." (217 U. S. 91.)

It is apparent that the intercourse or information, included in the *Textbook Case*, was correspondence and information which was sold as a commodity in written or printed form. It was correspondence and information which constituted the subject matter of the interstate transaction of purchase and sale and was not mere correspondence about or concerning financial transaction. In that situation, the correspondence or information became a commodity, interstate sales of which were quite analogous to interstate sales of other commodities. The correspondence and information stood therefore in the *Textbook Case* in precisely the same light under the Commerce Clause as the books or apparatus which were also included as subjects of the interstate contracts in that case. Such correspondence and information, consisting of instruction papers and the like, sold, shipped, and delivered to persons in other states, were clearly in the nature of tangible choses in possession and were sound articles of commerce as much as books (*Security State Bank v. Simmons*, Mo. 157 S. W. 585) or newspapers (*Preston v. Finley*, 72 Fed. 850).

Correctly appreciated, it is clear that the *Textbook Case* is well within the long established principle that interstate traffic in commodities is subject to the Commerce Clause and it is not authority for more than that.

If that case ever might have been thought to have the scope which counsel here contend for, its repeated re-statement by the Court on subsequent opinions should preclude any further misapprehension in that regard.

Thus the holding in the *Textbook Case* is succinctly and exactly stated in the language of Mr. Justice Pitney in the unanimous opinion of this Court in *U. S. Fidelity Co. v. Kentucky*, *supra* (italics ours):

“In the case of the International Textbook Company, there was a systematic and continuous interstate traffic in instruction papers, textbooks, and illustrative apparatus for courses of study pursued by means of correspondence, and this was held to be in its essential characteristics commerce among the states within the meaning of the Federal Constitution, and entitled thereunder to exemption from any direct burden imposed by state legislation.” (231 U. S. 398.)

Again, in the *New York Life Case*, *supra*, it was pointed out as the ground of distinction that the *Textbook Case* was “concerned with transactions which involved the transportation of property.” (231 U. S. 511.)

The subsequent citation of the *Textbook Case* in *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205-215, *Sioux Remedy Co. v. Cope*, 235 U. S. 197-202, and *Looney v. Crane Co.*, U. S. Adv. Op. 1917 pp. 144-147, cases involving interstate business in sound articles of commerce, is in consonance with our view here urged of the *Textbook Case*. But the *Textbook Case*, as to the point we here consider, would not have been apposite in those cases if it were a holding that mere interstate correspondence or communication, independently considered, constitutes commerce. Nor is the citation of the *Textbook Case* in the *Blue Sky Cases* here, 242 U. S. 539, at p. 558, at all inconsistent with the view of the holding in the *Textbook Case* which we would emphasize.

The Telegraph Cases

The *Telegraph Cases*, which we think may be regarded as all contained in the first of them, *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, for the others merely follow that case, are referred to on the plaintiff's brief and were referred to and quoted from in the Court's opinion in the *Textbook Case*. *The holding in the Pensacola Case is simply that the telegraph, as an instrumentality of commerce, is subject to the Commerce Clause.*

That case, so far as it rests upon the Commerce Clause, goes essentially upon the consideration that the general and extensive use of the telegraph largely, if not principally, for commercial purposes and incident to interstate commerce and the transportation of goods and merchandise in such commerce, *stamped the telegraph with the character of an instrumentality of commerce.*

As said upon the opinion (*italics ours*):

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become *one of the necessities of commerce*. It is indispensable as a means of intercommunication but especially is it so in *commercial transactions*. The statistics of the business before the recent reduction in rates show that *more than eighty per cent of all the messages sent by telegraph related to commerce.*
• • • Contracts are made by telegraphic correspondence, *cargoes secured and the movement of ships directed.* The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters into an important transaction without using the telegraph freely to secure information." (96 U. S. 1, 9-10.)

That decision, moreover, was rested as largely upon the power of Congress "to establish postoffices and post roads" as upon the Commerce Clause.

The case is no authority for the proposition that a mere personal communication by telegraph is in itself commerce or that the resort to the telegraph as a means of communication between persons in different states with reference to their mere private transactions of business or pleasure is sufficient to stamp such private transactions, of whatever nature, with the character and status of interstate commerce. It is, we submit, palpably inexact to refer to the *Telegraph Cases* as holding that mere interstate communication or correspondence or that "information" transmitted from state to state is interstate commerce.

Butler Bros. Shoe Co. v. U. S. Rubber Co.

The use of the word "information" by Judge Sanborn in *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, in the passage quoted on page 36 of plaintiff's brief and which was also quoted in the *Textbook Case*, is not applicable as counsel seek to apply it. If that language were to be regarded as declaring that mere information or communication is commerce, it is clearly outside of the cases and obiter in the opinions. The *Telegraph Cases*, which prompted the mention of "information," did not deal with such a question and did not so hold. Certainly no such question was before Judge Sanborn in the *Butler Bros. Shoe Co. Case*, in which was involved only the question whether certain contracts for the transportation and delivery from the East to Colorado, of boots, shoes and rubbers, were protected by the Commerce Clause. The question simply was, as stated by Judge

Sanborn "whether or not the state could lawfully prohibit their importation and annul all contracts therefor." (156 Fed. 16.)

Gibbons v. Ogden

Nor is the term "intercourse" as used in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190, susceptible of any such unlimited application as the exigencies of plaintiff's case here require and as counsel contend for. The question there was, of course, whether navigation was commerce under the Commerce Clause. The question was answered in the affirmative against contentions that the Commerce Clause should be held to apply only to sales of goods between citizens of different states.

The declaration of Chief Justice Marshall that "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse," was made in answer to this contention of the counsel:

"The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and would not admit that it comprehends navigation."

The single sentence quoted by counsel for plaintiff here is not a full statement of the thought. The great Chief Justice did not leave the term "intercourse" there without limitation or modification—did not leave it to be inferred that it was held or intended to hold, that any and all intercourse is commerce. On the contrary, it is expressly and immediately limited to "commercial intercourse," viz. (*italics ours*):

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the *commercial intercourse* between nations and parts of na-

tions, in all its branches, and is regulated by prescribing rules for carrying on *that* intercourse." (9 Wheat. 189-190.)

It is clearly in this understanding of *Gibbons v. Ogden* that it is referred to in the subsequent opinion of this Court in the *Pensacola Case*, *supra*, where the Court said (italics ours) :

"Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that *commercial* intercourse is an element of commerce which comes within the regulating power of Congress."

If the use of the terms "intercourse" and "information" in those cases are to be given the effect contended for by the plaintiff in this case, then the *Insurance Cases*, certainly the *New York Life Case* and the *Cravens Case*, *supra*, where, as here, interstate intercourse and interstate transmission of information were elaborately exhibited and relied upon, were wrongly decided. If counsels' contention be allowed, then clearly *U. S. Fidelity Co. v. Kentucky*, *supra*, was wrongly decided, for there the business held not to constitute interstate commerce *consisted of* the furnishing of information by means of interstate intercourse.

The Lottery Case.

Aside from the *Textbook Case*, plaintiff's chief reliance on this point is the *Lottery Case*, *Champion v. Ames*, 188 U. S. 321. We contend that this case also is not in point to support plaintiff's contention that its loan and investment business is commerce. The analogous question whether a lottery or the *conduct of a lottery* is commerce was not presented or decided in the *Lottery Case*. The

question there was simply whether Congress had power under the Commerce Clause to prohibit the interstate *transportation* of lottery tickets and the holding there was simply that such *transportation* was commerce and that power to regulate commerce under the Commerce Clause included the power to exclude from such commerce the *transportation* of things, the transportation of which was resorted to in the promotion of enterprises *contra bonos mores*.

In that case the defendant was indicted for shipping lottery tickets from Dallas, Texas, to Fresno, California, by "Wells Fargo Express" in violation of an act of Congress providing

"that any person who shall cause to be * * * carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery * * * shall be punishable," etc.

The opinion makes it clear that the question argued, considered and determined in the case was whether the interstate *transportation* of lottery tickets was subject to the power of Congress under the Commerce Clause. Thus (*italics ours*):

"The appellant insists that the *carrying* of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce among the states* * * *." (188 U. S. 325.)

The Court, at page 363 of the opinion, states its conclusion thus (*italics ours*):

"We decide nothing more in the present case than

that lottery tickets are subjects of traffic among those who choose to sell or buy them; *that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce*; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and *may prohibit the carriage of such tickets from state to state*; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.” (188 U. S. p. 363-364.)

The holding in the *Lottery Case* is succinctly and quite accurately stated in the syllabus paragraph as follows:

“The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried.” (188 U. S. 321.)

That such is precisely what was held and all that was held in the *Lottery Case* is made plain by the language of Mr. Justice Day in the unanimous opinion of this Court in *Ware & Leland v. Mobile County*, 209 U. S. 405, at pp. 409-410 (*italics ours*):

“It is unnecessary to review the former decisions of this court, as that has been done in very recent cases, such as the *Lottery Case* (*Champion v. Ames*), 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, where it was held that *the transportation of lottery tickets was interstate commerce*, and, as such, subject to regulation by act of Congress. In that case the federal act prohibiting the transmission of lottery tickets was sustained *because of the actual carriage in interstate traffic of the tickets themselves*;

and, in concluding the opinion of the majority of the court, Mr. Justice Harlan said" (quoting the concluding paragraph of the *Lottery Case* from which we have just quoted).

We submit therefore that it is perfectly clear that the *Lottery Case* is not authority for the proposition that a loan business is commerce, even though that business may be conducted by means of interstate communication or intercourse. If the instant case were one in which we had the question whether Congress might under the Commerce Clause *regulate the interstate transportation of assigned policies of insurance or of real estate mortgages or of bonds*, it might be argued that there is such analogy between such instruments and lottery tickets that Congress would have such power under the *Lottery Case*. But such is not the question here. The question here is whether the plaintiff's loan or investment business is commerce. To be in point even by analogy, the decision in the *Lottery Case* would have to be that the conduct of or participation in a lottery is commerce, which of course is not there held. There is a plain distinction between holding that interstate transportation of lottery tickets is interstate commerce and holding that a loan business is interstate commerce merely because there is interstate correspondence or communication about or concerning the loan transactions.

Blue Sky Cases

Counsel for the plaintiff, on page 45 of their brief, cite the *Blue Sky Cases* in the Federal District Courts as holding that dealings between persons in different states in stocks and bonds constitute interstate commerce. Six of these cases are cited, viz.: *Alabama etc.*

Transportation Co. v. Doyle, 210 Fed. 173, the Michigan case; *Compton Co. v. Allan*, 216 Fed. 537, the Ohio case; *Bracy v. Darst*, 218 Fed. 482, the West Virginia case; *Halsey v. Merrick*, 228 Fed. 805, the second Michigan case; *Sioux Falls Co. v. Stockwell*, 230 Fed. 236, the South Dakota case; and *Geiger-Jones Co. v. Turner*, 230 Fed. 233, the Ohio case.

Of course, the declaration in these cases that the buying and selling of stocks and bonds is commerce is not in point, even by analogy, in support of plaintiff's contention that the negotiation by plaintiff of policy loans or mortgage loans constitutes commerce. These *Blue Sky Cases* in the District Courts require attention only because of and with reference to that part of plaintiff's investment business consisting of the purchase of bonds.

The consideration given the commerce question in these District Courts cases is quite suggestive of the history of the decisions of the inferior federal and state courts condemning state laws regulating or prohibiting the use of trading stamps. Some fifty courts and some two hundred judges in the country, without adequate consideration and largely via the rubber stamp route, held the trading stamp schemes to be legitimate methods of advertising, devoid of any evil upon which could be predicated an exercise of the police power. When the question finally reached this court and was authoritatively considered, the opposite conclusion was held by a unanimous bench (*Rast v. Van Deman & Lewis Co.*, 240 U. S. 242; *Tanner v. Little*, id. 369; *Pitney v. Washington*, id. 387).

The *Blue Sky Cases* in the District Courts on this interstate commerce question are simply the Michigan case in the 210th Federal and reiteration thereof in the subsequent cases, without either adequate or convincing

consideration initially and practically without any consideration subsequently. The assertion in this first case

“that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the states, are interstate commerce”

does not appear to have been much considered by the court, nor is any authority cited for it. In fact, it is frankly admitted on the opinion that there is none, the court saying,

“We do not find that this has been expressly held in any authoritative decision * * *.”

Such consideration as was given to the proposition in that case was palpably misguided by the assumption that *Nathan v. Louisiana* and *Paul v. Virginia*, *supra*, had been in effect overruled by the *Lottery Case*, as appears from the language in reference to those cases: “If either of these cases might otherwise be thought now controlling” (p. 183). This questioning in the Michigan case of the present authority of *Nathan v. Louisiana* and *Paul v. Virginia* is an error on the part of the District Court vitiating its entire reasoning on the commerce question and it is especially conspicuous in view of the then recent and repeated reaffirmance here of the principle announced and established in *Nathan v. Louisiana* and *Paul v. Virginia* (*New York v. Beardon*, 214 U. S. 152; *Ware & Leland v. Mobile Co.*, 209 U. S. 405; *Fidelity Co. v. Kentucky*, 231 U. S. 394, and *New York Life v. Deer Lodge Co.*, 231 U. S. 495).

This inadequate consideration of the question in the first Michigan case, proceeding thus upon erroneous premises, was simply adopted in the Iowa case and the West Virginia case and in the South Dakota case, which

had been decided but the opinion in which had not been published at the time of the second Michigan case. In the second Michigan case the court merely treated the question as settled by its decision in the first case, citing as added authority the decisions in the Iowa, West Virginia, and South Dakota cases, of which it said: "Our conclusions then announced have been more or less completely approved" (228 Fed. 806). The District Court in the Ohio case, while amplifying the discussion by reference to *Crutcher v. Kentucky*, 141 U. S. 147; the *Textbook Case*, and *Buck Stove & Range Co. v. Vickers*, *supra*, based its conclusion on the commerce question upon the District Courts' decisions in the Michigan, Iowa, West Virginia and South Dakota *Blue Sky Cases*.

As a side light on the looseness and inadequacy of the consideration of the commerce question in these cases, note that in the first Michigan case it was said that *stocks* were distinguishable from lottery tickets and from bonds and were only "probably" subjects of interstate commerce (210 Fed. 183). In the Iowa and West Virginia cases *stocks* were unequivocally included, upon authority of the Michigan case, and unequivocally included also in the second Michigan case, upon the authority of the first Michigan case and the others which followed it. And in the Ohio case it is said that

"express rulings by the federal courts establish beyond all reasonable controversy that *stocks* and bonds, * * * are articles of interstate commerce."

As further instancing the inadequacy of presentation of these cases, note the statement in the West Virginia case:

"So far as we can learn the Arkansas act has not been passed upon by either the court of last resort of the state or by the United States courts of the state." (218 Fed. 488.)

Whereas, the Arkansas act had been in fact and more than a year before passed upon and sustained in both "the court of last resort of the state" and by "the United States courts of the state." (110 Ark. 269; 217 Fed. 904.) We submit that these *Blue Sky Cases* in the District Courts are not convincing and are not even persuasive to support the proposition that even that part of plaintiff's investment business consisting of the purchase of bonds constitutes commerce.

When the *Blue Sky Cases* reached this Court the proposition that stocks and bonds are articles of commerce was elaborately argued and earnestly pressed here, but this Court did not find it necessary in those cases to pass upon, affirm or disaffirm it. It was merely held here that, even though such securities might be regarded as articles of commerce, the Blue Sky Laws should be sustained as police regulations and that, to hold otherwise, would be to extend to stocks and bonds greater immunity from state regulation than the decisions of this Court accord to sound articles of commerce. (242 U. S. 558.) What is said here on the subject of interstate commerce in the *Blue Sky Cases* is all found in the last two pages of *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 557-559, and the other cases, *Caldwell v. Sioux Falls Co.*, 242 U. S. 559, 567-568, and *Merrick v. Halsey Co.*, 242 U. S. 568, 590, are disposed of on the interstate commerce question by reference merely to *Hall v. Geiger-Jones Co.* That this Court was not persuaded to the view declared in the District Courts is, we take it, clearly indicated by the many unanswered and unanswerable

questions propounded by the Court in the concluding paragraph of the opinion in *Hall v. Geiger-Jones Co.*, *supra*, as necessary to be considered and answered, if the hypothesis that interstate sales of stocks and bonds constitute interstate commerce were adopted.

We submit that we have shown that the cases relied upon by the plaintiff do not support the contention that plaintiff's loan business is interstate commerce. We have shown, we submit, that nowhere in the cases relied upon by the plaintiff has this Court held the business of lending money upon the security of assigned policies of insurance or of real estate mortgages or the buying of bonds to be commerce.

It seems to us that counsel for the plaintiff rather assume than attempt to show that the plaintiff's loan business is commerce. They appear to proceed upon the assumption that all business is commerce and all interstate business interstate commerce, save insurance, which they would except on the decisions of this Court in the insurance cases, although contending that those cases are wrong and out of line with the general proposition.

Of course, all business is not commerce. We freely concede that commerce, as that term is used in the Commerce Clause, has, out of the decisions here, come to have a broader meaning than is ordinarily attributed to it—as including more than traffic in goods. As was said here in *Mobile County v. Kimball*, 102 U. S. 691, commerce under the decisions of this Court

“consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.”

To which definition there is added by the *Telegraph Cases* the common carrier business of transmitting mes-

sages by telegraph. All this conceded, however, *there is no warrant for the assumption that any other business is commerce and there is no presumption that any business, the status of which under the Commerce Clause may be undefined, is or may be interstate commerce.*

The plaintiff's loan or investment business consists for the most part of mere private transactions *inter partes* in the negotiation and consummation of loans of money upon assigned policies of insurance and upon real estate mortgages taken as security. The rest of plaintiff's loan or investment business, consisting of the investment of its reserve funds in bonds, is merely the acquiring and owning of an interest in public or corporate borrowings. The only interstate transmission or transportation involved in these transactions is of *writings about or concerning*, or of *written evidences* of the loan or of written instruments given to secure and facilitate repayment of the loan. Obviously, there are broad distinctions between these *writings about or concerning the subject matter* (loan) and the consequences of their interstate transmission or transportation, as affecting the subject matter itself with an interstate commerce character, and goods, books or instruction papers, *themselves the subject matter of sale*, and the sale and transportation of which from state to state is interstate commerce.

These distinctions are quite overlooked in the assertion by the late Mr. Justice Timlin, dissenting below, upon which assertion the plaintiff here rests its case under the Commerce Clause that:

“ * * * Carrying on a loan business involving the transmission of money and securities, with the necessary correspondence, instructions, vouchers and other writings, constitutes interstate commerce.”

That assertion is unsupported by authority either in the decisions here or elsewhere.

On the other hand we refer the Court to several authorities in the decisions here and in other courts which show directly or by analogy that such loan business is not commerce.

Nathan v. Louisiana

The plaintiff in error in the leading case of *Nathan v. Louisiana*, 8 How. 73, was an exchange broker, engaged exclusively in negotiating and effecting for others the purchase and sale of exchange on other states or foreign countries. He had been held liable in the state courts to pay a state occupation tax of \$250 per annum for engaging in that business. It was contended that this was a burden on interstate and foreign commerce, unlawful under the Commerce Clause. This Court, in a unanimous opinion, held that although bills of exchange were *instruments* of commerce, convenient if not necessary to it, they were not *subjects* of commerce and that, therefore, interstate transactions in the buying and selling of bills of exchange on other states is not interstate commerce. In the course of the opinion, by Mr. Justice McLean, the Court said:

“A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.” (8 How. 81.)

And, speaking of the exchange broker (*italics ours*):

"He is *not engaged in commerce*, but in supplying an instrument of commerce."

As the Court in that case pointed out, if buying and selling foreign bills of exchange is interstate commerce, then all state banks by virtue of being authorized and engaged in that business would be immune, under the Commerce Clause, from state taxation and, we may add, from state regulation. The decision in *Nathan v. Louisiana* has recently been reaffirmed and relied upon as authority in several decisions of this Court. (*New York Life Ins. Co. v. Deer Lodge Co.*, *supra*; *U. S. Fidelity Co. v. Ky.*, *supra*; *Ware & Leland v. Mobile Co.*, *supra*; *New York v. Reardon*, *supra*.) It has stood as authority on this proposition, unquestioned and unqualified by this Court, through almost "three score years and ten" since it was announced.

Certainly, it would seem, if buying and selling bills of exchange, "instruments of commerce," is not commerce, the lending of money either as policy loans or mortgage loans or the buying and selling of bonds, public or corporate, is not commerce. Neither assigned policies of insurance, real estate mortgages nor public nor corporate bonds are even instruments of commerce. They are merely instruments devised to evidence indebtedness and to facilitate and secure repayment of money loaned.

Fidelity Company v. Kentucky

The business held subject to state taxation in *United States Fidelity Co. v. Kentucky*, 231 U. S. 394, would seem clearly to have had a much better claim to the protection of the Commerce Clause than plaintiff's loan

business, for that business, unlike plaintiff's, had a relation to and a purpose to promote interstate traffic. The case involved a tax on nonresident commercial agencies and arose upon an indictment of the company, for having, without first paying the tax, employed a firm of attorneys to represent it in the state of Kentucky to report to it and to its subscribers in other states upon the credit and financial standing of persons engaged in business in that state. Of course, that business inherently considered is not commerce, and that it is does not appear to have been even contended except upon the ground of its relation to sales and transportation of goods and by setting forth (as is done by plaintiff here) the manner of conducting the business by means of interstate communication, correspondence and reports.

The Court pointed out that, though this business might have a relation to commerce, the *representatives of the commercial agency* were not engaged in commerce, saying (*italics ours*):

"They did not sell or offer to sell any goods, nor deliver or offer to deliver any, and had nothing to do with buying, selling, transporting, delivering, or handling any merchandise. If any *commercial* transaction took place between the merchant whose standing was reported and the merchant to whom the report was sent, it was due entirely to negotiations between them, with which the reporting attorney had nothing to do." (231 U. S. 396-397.)

And further:

"The circumstance that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise, from state to state, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling. * * * To warrant interference

with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial." (Pp. 398-399.)

Here, then, was a business consisting, inherently and independently, of interstate intercourse and inquiries and information transmitted from state to state through the mails (which are incidents merely in the instant case of plaintiff's manner of doing business but relied on to give that business character and status as interstate commerce) and that business was held not to be interstate commerce. Obviously plaintiff's loan business, if not inherently interstate commerce, cannot derive that character from incidents of the business which themselves have not that character.

Williams v. Fears

In *Williams v. Fears*, 179 U. S. 270, it was held that an interstate business of an emigration agent in hiring labor to be employed outside the state was not interstate commerce. *Mobile County v. Kimball*, *supra*, is referred to for the definition of "commerce" under the Commerce Clause and *McCall v. California*, 136 U. S. 104, and *Norfolk & W. R. Co. v. Penn.*, 136 U. S. 114, cases cited for plaintiff here, were distinguished, and *Nathan v. Louisiana*, *Paul v. Virginia* and *Hooper v. California*, *supra*, were followed, the court saying:

"The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the states, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate com-

merce, or that the tax on that occupation constituted a burden on such commerce." (179 U. S. at p. 278.)

Such a business, of course, was one of and involving interstate communication and correspondence and had better claim to interstate commerce status than plaintiff's business in that its immediate result was interstate transit of persons, concededly commerce under the Commerce Clause, differing in that regard from the *McCall Case*, *supra*, in that such transit of persons (like the interstate transmission and communication in the case at bar) was incidental only to the business and not the object of it as in the *McCall Case*.

Ware & Leland v. Mobile County

In *Ware & Leland v. Mobile County*, 209 U. S. 405, this Court sustained a state occupation tax on "the business of buying and selling futures." *Ware & Leland* had offices in Mobile, New York, New Orleans and Chicago and their business consisted of buying from and selling to persons in other states future contracts for cotton and grain. Actual delivery of the commodities was demandable, though not usual, and in some instances there was actual delivery involving interstate transportation of cotton and grain. Such contracts, like plaintiff's securities here, were choses in action representing or evidencing valuable rights acquired by purchase for money, were assignable and the subject of barter and sale between persons in different states, and their sale and delivery was negotiated and made through extensive interstate intercourse, correspondence and transmission by mail and telegraph. The Court distinguished the *Lottery Case* in the language quoted at p. 77, *supra*, and the *Telegraph Cases* and, following

the *Insurance Cases* (pp. 410-411), held that interstate transactions in such contracts are not commerce under the Commerce Clause, saying (*italics ours*):

"The plaintiffs in error are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. *They are, in no just sense, common carriers of messages, as are the telegraph companies.* For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce." (209 U. S. 412.)

And, after pointing out that actual interstate transportation of commodities in fulfillment of such contracts was but casually incidental, concluded (*italics ours*):

"*These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company.*" (209 U. S. 414.)

Engel v. O'Malley

The law of New York sustained in *Engel v. O'Malley*, 219 U. S. 134, imposed a state license fee and other conditions upon private bankers. It was contended, *inter alia*, that, as the business of the bank consisted chiefly of receiving deposits of money to be accumulated and transmitted to other states and foreign countries, the law imposed a burden on interstate and foreign commerce, in contravention of the Commerce Clause. The court, citing the *Ware Case* and *Williams v. Fears, supra*, held that "the Commerce Clause of the Constitution" was "not infringed."

New York v. Reardon

New York v. Reardon, 204 U. S. 152, arose under the New York stock transfer tax. Although the parties to the transfer in suit, who were nonresidents, were both present in New York and made the transfer there, the decision on the interstate commerce question is not rested solely on that ground. The implication that a sale of corporate stock is not regarded as commerce is, we think, clear and on this "general question" *Nathan v. Louisiana* is cited (204 U. S. 161-162).

Standard Home Co. v. Davis, and other cases

Standard Home Co. v. Davis, 217 Fed. 904, *State v. Merrill*, 144 Pac. 925, and *Nelms v. Mortgage Co.*, 92 Ala. 157, 9 So. 141, are directly in point in opposition to the plaintiff's claim that its loan business constitutes commerce. *Standard Home Co. v. Davis*, the *Arkansas Blue Sky Case*, held in the words of the syllabus (*italics ours*):

"An investment company, which sells contracts requiring the purchaser to make monthly payments, which are invested by the company and, after a certain number of successive payments have been made, returned, with the profits earned, not exceeding a specified sum, and which also makes loans to its contract holders for the purchase of homes, taking mortgage on the property purchased, is not engaged in commerce, within the meaning of the Commerce Clause of the Constitution; and the fact that its business is interstate does not render a state statute regulating its operations within the state unconstitutional as in violation of such clause."

The District Court in the opinion after describing the Home Company's business said:

"This is no more commerce than insurance," citing the *New York Life Case*, *supra* (217 Fed. 915).

and added:

"Nor are loans of money made to clients for the purpose of enabling them to acquire homes commerce, within the meaning of the Commerce Clause of the Constitution," citing the *Nelms Case*, *supra*, and *Southern Building & S. Assn. v. Norman*, 98 Ky. 294, 32 S. W. 952.

The *Nelms Case*, *supra*, was a suit by a foreign corporation to foreclose a mortgage in the courts of Alabama. It was set up that the Mortgage Company was not licensed to do business in Alabama and so not entitled under the laws of the state to maintain an action in its courts. The company replied that, because it had negotiated the loan and advanced the money from another state, the transaction was one of interstate commerce. The suit was just such a one as would be brought by the plaintiff here to foreclose one of its mortgages on real estate in a foreign state. The court held (*italics ours*):

"Money is not a commodity of barter and sale, or to be put up and sold after being shipped, and the *lending of money by foreign corporations, engaged in that business, is not a matter of interstate commerce and may be subjected to the condition imposed by the Constitution.*" (9 So. 142.)

Such loan transactions as carried on by building and loan associations are not inherently different from plaintiff's policy loans and mortgage loans. Again in *State v. Merrill*, *supra*, the Supreme Court of Washington held

that the business of building and loan associations, including such loans, is not commerce.

The Insurance Cases

The insurance cases cited *supra* at page 45 beginning with *Paul v. Virginia*, to and including *New York Life Ins. Co. v. Deer Lodge County*, make a formidable body of authority establishing as nearly as may be established, except by a decision of this Court expressly upon the point, that the plaintiff's loan business is not commerce. In these cases, it is held that a mere private contract of indemnity is not commerce. This is held upon consideration of the *intrinsic, inherent quality and character* of the business. It is adhered to, notwithstanding the insurance may pertain to facilities of commerce, as in the case of marine insurance, and notwithstanding the conduct of the business may entail an extensive interstate intercourse and a large use of the agencies of interstate communication and transmission.

The determination reached in *Paul v. Virginia*, and the adherence of this Court thereto in the face of repeated assaults thereupon through all the years since, emphasizes in the strongest possible way that *the controlling consideration in determining whether a business is commerce is the inherent quality and character of the business itself*. The business here involved, instead of being mere private contracts of indemnity, as in the insurance cases, consists of mere private contracts for the loan of money. Such a business clearly is not within any of the definitions of commerce found in the decisions of this Court under the Commerce Clause. It is not traffic in goods, wares or merchandise. It is not transportation of persons or property or the transit of persons from one state to another. It is not an instrumentality of

commerce like the telegraph. It is not "commercial intercourse."

This loan business not being inherently commerce, the manner of conducting it is not controlling. The use, however extensive, of the mails and other agencies of communication and transmission in the conduct of the business does not make it commerce. The effort to give this loan business an interstate commerce character and status, by reference to the manner of conducting it, cannot accomplish that purpose here any more than it did with respect to the insurance business in the *Cravens Case* and in *New York Life Case*, *supra*. What we have already said to the point that insurance is not commerce, notwithstanding the manner in which it is conducted, and what we have quoted in that connection from the *New York Life Case*, is equally applicable to this loan business, and we ask the Court to refer to that part of our brief (pp. 45-49) in this connection.

Moreover, what is said in the *New York Life Case* is well-nigh an express ruling by this Court upon this loan business so far as mortgage loans and policy loans are concerned. We submit that a mortgage of real estate, which is either a grant upon condition or a pledge of the title for money loaned, is no more commerce than a sale of real estate for money paid. The negotiation and consummation of the loan through interstate intercourse is no more efficient to give interstate commerce character and status to the loan than would be the making of a sale of the real estate in the same manner. As was said by this Court in the *New York Life Case*, *supra* (italics ours):

"That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal

contract the transportation of commodities from one state to another, to paraphrase *Paul v. Virginia*. *Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.*" (231 U. S. 509-510.)

In using the illustration of a sale of real estate in the passage above quoted, we take it the court did not intend to use a doubtful or disputable illustration. It was apparently thought that noone would suggest that a sale of real estate is commerce. Noone ought to suggest that a mortgage of real estate is commerce.

In the *New York Life Case*, the policy loan was exhibited along with other interstate transactions in the effort to have an insurance business, as there conducted, held to be commerce. The Court in effect held that the policy loan had no such quality or result. The following from the opinion is equally applicable to the policy loan business of the plaintiff (italics and parentheses ours):

"The quality that is thus ascribed to them (insurance policies) *may be ascribed to any instrument evidencing a valuable right*. The argument was anticipated in *Paul v. Virginia*, citing *Nathan v. Louisiana*, where, as we have seen, a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the states or with foreign nations." (231 U. S. 510.)

Moreover, it is pertinent to note in this connection that this Court holds that *policy loans*, made pursuant to the terms of a policy of life insurance, are not intrinsically loans at all, but *mere advance payments of the*

policy, and that the additional payments required in consideration of such advances is not interest, but mere additional premiums under the policy, the whole being a mere transaction of insurance. *Orleans Parish v. New York Life Ins. Co.*, 216 U. S. 517, affirming *New York Ins. Co. v. Board of Assessors*, 158 Fed. 462.

The purchase of a bond, as we have already pointed out, is intrinsically but the making of a loan, whether the security be a pledge of public credit or a mortgage of a railroad. A loan in this form is, therefore, not commerce, but a mere financial transaction. Upon the considerations and authorities above set forth, we submit that, should the question be passed upon here, it will be held that plaintiff's loan or investment business is not commerce, and therefore not interstate commerce.

7. The License Fee, being a Tax imposed upon a Domestic Corporation for Purely Local Privileges and a Tax, therefore, Clearly within the Jurisdiction of the State to Impose, may Lawfully be Measured by Reference to Things not Taxable by the State.

The license being required and the fee being exacted under the state law only as a condition precedent to the right to transact a life insurance business within the state, a matter clearly within the jurisdiction of the state, it is the settled rule, upon which many cases have been here decided, that the state having jurisdiction to impose the tax, may measure the amount of it by reference to things not taxable by the state. Under this rule even though the plaintiff's "investment" business so-called were interstate commerce and even though the tax were measured by reference to the amount or value of the interstate transactions, the license fee would still not be

a tax or burden upon interstate commerce in violation of the Commerce Clause.

It is well settled by the decisions of this Court that a government, having jurisdiction to impose a tax either upon persons or subject matter within its taxing jurisdiction, may lawfully measure the tax by reference to property or business or income which, itself, would be nontaxable by it.

Flint v. Stone-Tracy Co., 220 U. S. 107, 162, 165;

Baltic Mining Co. v. Mass., 231 U. S. 68;

Wis. & Mich. Ry. Co. v. Powers, 191 U. S. 379;

Horn Silver Mining Co. v. New York, 143 U. S. 305, 317-318;

Adams Express Co. v. Ohio, 165 U. S. 194;

Cleveland etc. Ry. Co. v. Backus, 154 U. S. 438, affirming 133 Ind. 609;

Maine v. Grand Trunk Ry. Co., 142 U. S. 217;

Delaware Railroad Tax Case, 18 Wall. 206, 231-232;

Kansas City etc. R. Co. v. Botkin, 240 U. S. 227, 232, 235;

Kansas City M. B. & R. Co. v. Stiles, 242 U. S. 111, 119-120.

In *Flint v. Stone-Tracy Co.*, *supra*, it was contended that the federal corporation tax was invalid because it was a tax upon the income of corporations derived from state and municipal bonds not subject to taxation by the federal government, and the law was sustained upon the distinction which we here suggest, the court holding that the tax was one in the nature of an excise for the privilege of doing business in interstate commerce as a corporation, and that income was referred to merely for the purpose of measuring the tax, and that such tax

might be measured upon income itself not taxable. Referring to the argument against the tax the court said:

"But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed." (220 U. S. 162.)

The court distinguished *Galveston etc. Ry. Co. v. Texas*, 210 U. S. 217, and *Western Union Tel. Co. v. Kan.*, 216 U. S. 1, leading cases cited on plaintiff's brief here, and, reviewing other cases, said, speaking through Mr. Justice Day (italics ours):

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable." (P. 165.)

The Massachusetts law, drawn in question in the *Baltic Mining Co. Case*, *supra*, was an excise tax imposed upon foreign corporations, exclusive of railways and transmission companies, for doing business within the state. The tax was measured upon a percentage of the authorized capital stock of the corporation. It was urged against the tax that it was a tax upon the stock of the corporation owned outside of the state and representing property outside of the state and hence beyond the jurisdiction of the state to tax, and that, such corporation being engaged in interstate commerce, the tax was a burden on interstate commerce. The distinction between the subject of the tax and the measure of it was again made and is stated in the following language of the syllabus paragraph:

"While interstate commerce itself cannot be taxed, the receipts or property or capital employed

therein may be taken as a measure of a lawful state tax." (231 U. S. 68.)

In this case, again, some of the cases relied upon by the plaintiff here, and other cases of the same class, are distinguished, and upon a review of the prior decisions the Court said (*italics ours*):

"The examination of the previous decisions in this court shows that they have been decided upon the application to the *facts of each case* of the principles which we have undertaken to state, and a tax has only been invalidated where its *necessary effect* was to burden interstate commerce or to tax property beyond the jurisdiction of the state." (P. 86.)

And further:

"The conclusion, therefore, that the authorized capital is only used as the *measure of a tax*, in itself lawful, without the *necessary effect* of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a *measure of taxation*, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." (P. 87.)

In the *Horn Silver Mining Co. Case*, *supra*, the tax was a franchise tax upon the right to do business as a corporation in the state and was measured upon the capital stock of the corporation and the rate of dividends being derived, in part, from the receipts of interstate commerce. Here, again, the Court made the distinction between the subject of the tax as one within

the jurisdiction of the state, and the measure of the tax by reference to property or income itself not taxable, saying (*italics ours*):

"The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company." (Pp. 317-318.)

The same distinction is made in *Adams Express Co. v. Ohio*, *supra*. There the tax was one upon the property of telephone, telegraph and express companies, but it was provided that the tax should be measured by reference to the entire property both within and without the state, the amount of capital stock outstanding, the length of lines within and without the state and earnings from all sources, and contemplated an apportionment of a part of the value of the property so determined as an entirety to the state for purposes of taxation upon some basis, necessarily more or less arbitrary.

The case of *Maine v. Grand Trunk Ry. Co.*, *supra*, involved a railroad license fee tax imposed for the privilege of operating the railroad within the state measured upon gross receipts of the railroad as an entirety, apportioned to the state upon the basis of miles of line within and without the state. It was shown that this apportionment resulted in measuring the tax in part upon the receipts of interstate commerce. That holding was reversed in this Court upon the precise ground and

distinction which we here suggest, the court saying, in the course of the opinion, that the resort to the receipts, including receipts from interstate commerce

"was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation." (P. 228.)

And from the prior decision in *Home Ins. Co. v. New York*, 134 U. S. 594, is quoted in part (italics ours):

"The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.*" (142 U. S. 230.)

The decisions in *Wis. etc. Ry. Co. v. Powers* and *Cleveland etc. Ry. Co. v. Backus*, *supra*, are rested upon the principle of *Maine v. Grand Trunk Ry. Co.*, *supra*.

In the earlier case of the *Delaware Railroad Tax*, *supra*, the same principle was recognised and applied. That was a tax upon a domestic corporation measured at a per centum upon the value of that proportion of the entire capital stock which the miles of road within the state bore to the entire mileage. It was urged against the law that it imposed a tax upon the stock of the corporation which was owned outside of the state and beyond its taxing jurisdiction, and also that the value of the property of the company within the state, being

much less in proportion than its miles of road, the tax was in effect upon property without the state and without its jurisdiction. But the Court held that the tax was one upon the corporation as an entity, saying (*italics ours*):

“As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation; but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportionate part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.” (18 Wall. 231.)

And saying in conclusion:

“The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discrimination against rights held in other states, and the tax is not on imports, exports or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress.” (P. 232.)

In the recent cases of *Kansas City etc. R. Co. v. Botkin*, and *Kansas City M. B. & R. Co. v. Stiles*, *supra*, the earlier decisions which we here cite and rely on are reviewed and this distinction between the subject of a tax and the measure of it is reaffirmed and applied.

Were the loan or investment feature of the plaintiff's business to be regarded as commerce within the meaning of the Commerce Clause, the foregoing would be a sufficient answer to its contention that the license fee tax is

invalid as a burden on interstate commerce. The tax, as we have seen, is not imposed at all upon plaintiff's investment business. Plaintiff was not required to pay the license fees in suit as a condition of engaging in that business. Its refusal to do so would not prevent it from transacting that business.

The tax is solely upon the plaintiff as a domestic corporation as an exaction for the privileges of exemption from personal property taxation and of engaging in the insurance business in the state.

Both of these inducements or considerations for the tax are local special privileges clearly within the jurisdiction of the state to grant or to withhold altogether. If granted by the state, they are clearly within its jurisdiction to tax and, under the authorities here, the tax may be measured by reference to income, even though it might be concluded that the income included receipts from interstate business or outside property not taxable by the state. So ruled the state court in this case upon the authority of cited decisions of this court and, we submit, correctly so ruled.

Upon this branch of the case, we conclude that the license fee statute is not invalid as in contravention of the Commerce Clause.

III.

The Classifications, Discriminations or Exemptions Made by the License Fee Statute are not Arbitrary or Unwarranted or Otherwise in Contravention of the Fourteenth Amendment.

Counsel for plaintiff present their contentions in support of the claim that the license fee statute is invalid under the Fourteenth Amendment under headings III, pp. 78-119, and IV, pp. 120-130, of their brief. They rest their objection under the Fourteenth Amendment entirely on the "equal protection of the laws" clause of the amendment and make no argument under the other provision of the amendment referred to in the assignment of errors. Their argument also waives by omission any claim of invalidity argued below or assigned here based on the discrimination against plaintiff as compared with assessment and stipulated premium plan companies. They here contend only that the statute violates the Equality Clause by reason of claimed arbitrary discrimination; (1) against plaintiff, a domestic company, as compared with foreign companies, and (2) against plaintiff, a level premium company, as compared with fraternal societies.

It is to be noted that in deciding against plaintiff the questions raised under the Fourteenth Amendment the judges in the state court were unanimous. (Trans. p. 16.)

We shall not controvert the propositions made on plaintiff's brief that the tax is subject to the limitations of the Fourteenth Amendment nor that a domestic corporation may claim the protection of the Equality

Clause against arbitrary or unwarranted discrimination by the state, both propositions conceded by the state court. (Trans. p. 4.) Nor shall we claim that the annual privilege of doing an insurance business in the state which the plaintiff obtains by payment of this license fee is any greater or any less burdened by state regulation than that obtained by foreign companies to do the same kind of business in the state. Neither shall we question the plaintiff's mutual character as compared with that of the insurance feature in fraternal societies.

These questions aside, we have left on this branch of the case merely questions of classification. For, of course, counsel concedes "the familiar principle that the Equality Clause does not compel an ironclad rule of equal taxation. *Bell's Gap R. R. Co. v. Penn.*, 134 U. S. 232, 237." (Plaintiff's brief, p. 86.) The question simply is whether there are differences of situation or condition between the classes, as such, which are germane and which warrant classification and difference of treatment by the legislature. As a foundation for our argument on this branch of the case we will consider the established principles of classification and approved bases of classification in decided cases. Our argument will be presented in the following order:

1. Established principles and approved bases of classification.
2. The classification into domestic and foreign companies is not arbitrary, but rests upon valid and germane distinctions, viz.:

Plaintiff's corporate existence and powers are held and enjoyed by it by grant from the state and subject to revocation by the state.

Plaintiff is the beneficiary in other states of the retaliatory law of Wisconsin.

Plaintiff, in consideration of payment of the license fee, is granted exemption from all taxation on its vast holdings of personal property and from income taxation by the state, while the personal property and income of foreign companies are not within the taxing jurisdiction of the state but are presumably taxed by the states of their domicile.

3. The exemption of fraternal societies is not arbitrary, but is a reasonable exemption based upon valid bases of classification, among which may be mentioned:

The social, benevolent and charitable characteristics of fraternal societies.

The absence of vast reserves, the less value and security of the benefits provided for in benefit certificates of fraternal societies as compared with level premium insurance policies and differences in the manner of conducting the insurance feature in such societies as compared with the conduct of the insurance business of level premium insurance companies.

1. Established Principles and Approved Bases of Classification.

That under the Fourteenth Amendment there may be classification and discrimination in treatment of different classes by state laws must now be admitted.

"Nothing in the Fourteenth Amendment imposes any ironclad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions" (citing numerous cases).

St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 367-368.

Of course, it must also be admitted that the bases of classification may not be arbitrarily selected but found in considerations pertaining to each class as a class and be germane to the purpose or subject of the legislation. In short, classification there may be; reasonable it must be. The question here is whether the classifications here are in this sense unreasonable.

At the basis of this inquiry lies a fundamental limitation as to the scope of judicial review of acts of legislation which are to be tested by the rule of reason. This limitation, while in a sense self-imposed as a rule of judicial policy, is one which rests upon the fundamentals of constitutional government. It is one which cannot be overemphasized.

As between what is reasonable and what is arbitrary the difference may be wide or narrow. In the legislation itself the legislature has expressed its judgment to the effect that the classification or other principle of the legislation is reasonable.

The inquiry here is not, therefore, an original one but one merely to review the judgment of the legislature. *From this inquiry are excluded as legislative questions all questions of policy, and expediency. The question before the Court is solely one of legislative power.* The legislature as well as this Court is sworn to support the Constitution. The legislature as well as the judiciary is a coördinate and responsible branch of the government. Its responsibility within its constitutional powers is solely to the people of the state.

For these and, perhaps, other reasons this Court has taken the position that the scope of judicial review, upon a question of reasonableness to determine whether a regulation or classification is within the power of the legislature to enact, is limited, and courts will not con-

demn the legislative judgment, within the wide field of legislative discretion conceded to it, unless the action of the legislature is so palpably arbitrary that in no view of it can it be sustained as within the bounds of reason.

The principle, and the reason of it, are in part stated in the opinion of this Court, speaking through Mr. Justice Brewer, in *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews*, 174 U. S. 96, 104.

"It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

In the cases in this Court the same principle is declared again and again as though it were one which cannot be too often stated or too greatly emphasized, but one requiring frequent repetition for the benefit of litigants and counsel attacking the constitutionality of laws.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 111;

Gulf, Colo. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 156;

PeB's Gap Railroad Co. v. Pa., 134 U. S. 232, 237;

Mutual Loan Co. v. Martell, 222 U. S. 225, 235;

M. K. & T. Ry. Co. v. May, 194 U. S. 267, 269-270;

Williams v. Arkansas, 217 U. S. 79, 90;

Watson v. Maryland, 218 U. S. 173, 179;

Orient Ins. Co. v. Daggs, 173 U. S. 557, 562;

Magoun v. Ill. Trust & S. Bank, 170 U. S. 283,
293-294;

Singer Sewing Mach. Co. v. Brickell, 233 U. S.
304, 315;

German Alliance Ins. Co. v. Kansas, 233 U. S.
389, 418;

International Harvester Co. v. Missouri, 234 U. S.
199, 214;

Citizens Tel. Co. v. Fuller, 229 U. S. 322, 331.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540,
this Court said (*italics ours*) :

"A tax may be imposed only upon certain callings and trades, for when the state exerts its power to tax, it is *not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes*. It would be an intolerable burden if a state could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is *very great* and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the state" (p. 562).

Again, in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79:

"License taxes are imposed on certain classes of business, while others are exempt. It would practically defeat legislation if it was laid down as a rule that a statute was necessarily adjudged invalid if it did not bring all within its scope or subject all to the same burdens. It would strip the legislature of its inherent power to determine generally what is for the general interests, which interests may often be promoted by certain regulations affecting one class which do not affect another—certain burdens imposed on one which do not rest upon another" (p. 111).

In *Gulf, Col. & S. F. Ry. v. Ellis*, 165 U. S. 150:

"A large discretion in these respects was vested in the various legislatures" (p. 156).

In the leading case *Bell's Gap Railroad Co. v. Pa.*, 134 U. S. 232 (*italics ours*):

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, *exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions.* It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it *may allow deductions for indebtedness, or not allow them.* All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. * * * We think that we are safe in saying, that *the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation.* If that were its proper construction, * * * it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt" (p. 237).

In *Mutual Loan Co. v. Martell*, 222 U. S. 225 (italics ours):

"We have declared so often the *wide range of discretion* which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the *classification need not be scientific nor logically appropriate, and if not palpably arbitrary* and is uniform within the class, it is within such discretion" (p. 235).

In *M. K. & T. Ry. Co. v. May*, 194 U. S. 267 (italics ours):

"It is admitted also that legislation may be directed against a class when *any fair ground* for discrimination exists. * * * The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that *the legislature is the only judge of the policy of a proposed discrimination*. * * * When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see *clearly* that there is *no fair reason* for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" (pp. 269-270).

In *Orient Ins. Co. v. Daggs*, 172 U. S. 557, speaking of classification (italics ours):

"It suffices if it is practical and is not reviewable unless palpably arbitrary" (p. 562).

In *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283 (italics ours):

"With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a *wide latitude* so far as interference by this court is concerned, nor with the impolicy of a law has it concern. Mr. Justice Field said, in *Mobile County v. Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. * * * In other words the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion" (pp. 293-294).

In *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, it is said:

"In such matters the states necessarily enjoy a wide range of discretion. * * *" (p. 315).

In the recent and very pertinent case of *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389 (italics ours):

"A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, *outside of that wide discretion which a legislature may exercise*. A legislative classification may rest on narrow distinctions" (p. 418).

And, again, in *International Harvester Co. v. Missouri*, 234 U. S. 109:

"The cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the 'basis of community'" (p. 214).

In *Citizens Tel. Co. v. Fuller*, 229 U. S. 322, after reviewing numerous cases illustrating the principles of classification, the Court, speaking through Mr. Justice McKenna, said (*italics ours*):

"To these cases may be added others. They illustrate the power of the legislature of the state over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not *obviously exercised in a spirit of prejudice and favoritism*. * * * Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and *they need not be great or conspicuous*. *Keeney v. New York*, 222 U. S. 525, 536. The state is not bound by any rigid equality. This is the rule: *its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes'*" (p. 331).

Starting then with the Equality Clause of the Fourteenth Amendment, we have next, for guidance in our inquiry, the general rules by which the Court has interpreted and made a degree more definite the general language of the Constitution. We have then to be guided in the application of these rules by the fundamental principle that the questions presented are primarily legislative, that is to say, whether the classification is clearly and palpably unreasonable and arbitrary, all doubts being resolved in favor of the legislative determination.

The cases further make a minor, though significant, principle. This principle is that the reasonableness of a classification made by the legislature will not be tested by comparison of individuals of the classes, but rather by comparison of distinguishing characteristics belonging to the class in general. The line of separation be-

tween the classes may be and sometimes unavoidably is an arbitrary division. That there will be found on either side of the dividing line individuals which more properly belong on the other side will not invalidate the classification.

Statements of the principle are found repeatedly in the decisions of this Court. Thus, in *Ossan Lbr. Co. v. Union County Bank*, 207 U. S. 251:

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case * * *. In a classification for governmental purposes there can not be an exact exclusion or inclusion of persons and things." (P. 256.)

In *Heath & Milligan Co. v. Worst*, 207 U. S. 338:

"But logical appropriateness of the inclusion or exclusion of objects or persons is not required. * * *. At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it" (pp. 354-355).

Nor is the suggestion of a more nearly exact or wiser classification material, for

"Legislatures, as we have seen, have the constitutional power to make unwise classifications" (*Ibid.* p. 357).

And again, in *Mutual Loan Co. v. Martell*, *supra*,

"Classification need not be scientific nor logically appropriate" (222 U. S. 235).

In *M. K. & T. Ry. v. Cade*, 233 U. S. 642:

"As has been said before, the Fourteenth Amendment does not require that state laws shall be perfect * * *" (p. 650).

Some of the cases above cited and some which we will further cite in this connection deal with instances of the exercise of governmental power other than that of taxation, notably among them, instances involving exercise of the police power. But they deal in all cases with the legislative power of discrimination and classification under the Equality Clauses of the Fourteenth Amendment. Hence, the principles enunciated in these cases are here applicable, for the constitutional guaranties of equality before the law and of the equal protection of the laws, are limitations upon legislative power however exercised, and apply certainly in equal, if not greater degree, to the exercise of these other legislative powers than to the exercise of the power of taxation for the support of the government itself.

Thus, in *Citizens Tel. Co. v. Fuller*, *supra*, it is said:

"It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power * * *" (229 U. S. 329).

And in *Connolly v. Union Sewer Pipe Co.*, *supra*, it is rather forcibly suggested that the power of classification under the Fourteenth Amendment is broader for purposes of taxation than for purposes of regulation under the police power. (184 U. S. 562-563.)

We may, therefore, in the present case, involving classification for the purposes of taxation, invoke in support of the legislation the broadest rules and principles declared to support legislative classification for any purpose.

To get the full benefit which the light of precedent will shed upon the questions raised as to the validity of the classification here involved, it remains only to examine concrete cases and ascertain what in the past

have been recognized as considerations and distinctions germane and sufficiently substantial to support classification.

In this Court it has been held that the following considerations and distinctions are germane and will support classification for the purposes indicated:

A legislative purpose to encourage agriculture, to support an exemption of farmers or planters who grind sugar cane of their own production and refine sugar and molasses, the product thereof, from the imposition of a license fee imposed upon refiners engaged in the refining business.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 95.

The location of the property and franchises of foreign corporations without the state, and hence beyond the reach of the state for the imposition of property taxes, as justifying the taxation by the state of stock held by residents of the state in foreign corporations not operating in the state, although the stock of corporations operating in the state is exempt.

Kidd v. Alabama, 189 U. S. 730, 731-732.

The supposed greater likelihood of itinerant vendors to commit fraud in the sale of patented articles, as supporting a law impairing the negotiability of promissory notes given to itinerant vendors in payment for such articles, but not applying to the same when given to local dealers.

Ozan Lbr. Co. v. Union County Bank, 207 U. S. 271, 285.

A supposed established opinion or belief obtaining in a community to the effect that mixed paints composed of

certain ingredients are of good quality, to support the exception of mixed paints of such ingredients from the operation of a statute requiring that packages of mixed paints be labeled to show the ingredients, notwithstanding that "scientific men might find out by chemical and laboratory tests, or progressive men might discover by practical experiments" that mixed paints composed of other ingredients are of equal or superior quality and usefulness.

Heath & Milligan Co. v. Worst, 207 U. S. 338, 356-357.

The average amount of deposit received as indicating a class of depositors, probably largely immigrants unfamiliar with the laws and customs of the country and persons of small means requiring special protection, to support a law requiring a license and bond of private bankers, but excepting from the operation thereof individuals or partnerships where the average amount of each sum received on deposit is not less than five hundred dollars.

Engel v. O'Malley, 219 U. S. 128, 138.

Public supervision of banks and loan companies as rendering them unlikely to make loans on assignments of wages, to support an exception of such institutions from the operation of a statute rendering invalid assignments of wages unless made in compliance with several conditions and requirements of the act.

Mutual Loan Co. v. Martell, 222 U. S. 225, 235-236.

The absence of self-interest inducing railway companies to keep their rights-of-way free of noxious weeds, as supporting a law imposing a penalty for permitting

noxious grass and weeds to grow on railroad rights-of-way, but not applying to other land owners.

M. K. & T. R. Co. v. May, 194 U. S. 267, 270.

Public regulation of banks and pawnbrokers, to support an exception of them from the operation of a law fixing the maximum rate of interest which may be charged for the loan of money.

Griffith v. Connecticut, 218 U. S. 563, 569-570.

Publicity attendant upon the recording of mortgages as a restraint against the exaction of unconscionable interest on mortgage loans, to support the exception of such loans from the usury law.

Ibid. p. 570.

A period of prior practice in the state and a certain minimum of practice during the year preceding registration, to support an exception from a statute prohibiting any person to practice medicine without first obtaining a license and making certain proofs of qualifications to practice.

Watson v. Maryland, 218 U. S. 173, 177.

The possibility of public regulation of hospitals, as supporting the exemption of physicians practicing in hospitals from the requirements of such statute.

Ibid. pp. 179-180.

Differences, vaguely suggested, "in the elements insured against and the possible relation of the parties to them," to support a statute, prohibiting the insurer to deny, in the case of a total loss by fire of insured property, that the actual damage was the full amount of the insurance, applying to fire insurance companies, but

not applying to life, accident, indemnity, liability, plate glass, hail, lightning, tornado or other insurance companies.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 562.

Differences not indicated except by reference to *Orient Insurance Co. v. Daggs*, *supra*, to support a denial to telegraph companies of the right to limit by contract their liability for failure to promptly despatch and deliver messages, such right not being denied to other common carriers.

Western Union Tel. Co. v. Milling Co., 218 U. S. 406, 421.

Suggested greater likelihood that deposits in savings banks may be forgotten and abandoned than in the case of deposits in other institutions, as supporting a statute requiring abandoned deposits in savings banks to be turned over to the state, such statute not applying to other banking institutions.

Provident Savings Institution v. Malone, 221 U. S. 660, 666.

Advantages enjoyed by corporations over natural persons and partnerships in the conduct of business, as supporting an excise tax on corporations not imposed on others.

Flint v. Stone-Tracy Co., 220 U. S. 108, 161-162.

The danger of fire from railroad locomotives and the propriety of creating special inducements to greater care on the part of railroads to prevent fires, as supporting a statute awarding attorneys' fees to plaintiffs succeeding in actions against railway companies for

damages caused by fire set by locomotives, but not allowing attorneys' fees to the railway company defendant.

A. T. & S. F. R. Co. v. Matthews, 174 U. S. 96,
101.

A difference of state policy as between rectifiers or blenders of distilled spirits and distillers thereof, to discourage the former and encourage the latter, as supporting the imposition of a license tax on the former not imposed on the latter.

Brown-Forman Co. v. Kentucky, 217 U. S. 563,
573.

Want of territorial jurisdiction in the state to impose an occupation or license tax upon the business of rectifying, adulterating or blending distilled spirits outside of the state although sold within the state in competition with the product of blenders or rectifiers conducting such business within the state, as supporting the imposition of such license tax upon those engaged in such business within the state, but not upon those engaged in such business without the state.

Ibid., pp. 575-576.

Possibility that the evil legislated against may be especially experienced by the state in that line of business, as supporting a law prohibiting combination among fire insurance companies differing from the general laws of the state against combinations in restraint of trade.

Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410-
411.

A mode of selling sewing machines, the seller having a regular place of business in the county, but selling also and principally from wagons traveling from such

place of business through the county, as supporting the imposition of a license tax upon such dealers or agencies not imposed upon merchants selling only at their places of business.

Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 315.

An assumed policy of the state to foster farmers' co-operative fire insurance companies, to support an exception of "farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property" from the provisions of a law fixing fire insurance rates.

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 417-418.

The character of security taken for money loaned, assignments of salaries and household goods, as supporting a classification for license taxation whereby persons lending money on such security are taxed much higher than others lending money on commercial securities.

Bradley v. Richmond, 227 U. S. 477, 484.

Legislative policy and discretion, as sufficient to justify discrimination in a statute prohibiting combinations and restraints of trade in manufacture or sale of articles, but not applying to purchasers of articles or labor organizations.

International Harv. Co. v. Missouri, 234 U. S. 199, 210-215.

The fact that express companies operating with hired vehicles have generally little or no tangible property subject to general taxation, as supporting a definition of express companies subject to a gross earnings or li-

license fee tax including only such as operate with hired vehicles and not including railroad and steamship lines engaged in the same business with their own cars or vessels.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 353-354.

A predominant commercial character and purpose, as supporting the imposition of a license fee or gross earnings tax on telephone companies, but exempting telephone companies whose gross receipts within the state do not exceed five hundred dollars a year, such exempt class being found to embrace generally "coöperative or farmers' mutual associations, usually unincorporated, conducted at estimated costs and organized primarily to get for the association cheap telephone service."

Citizens Tel. Co. v. Fuller, 229 U. S. 322, 328.

The general difference in the extent and character of business done as between retail and wholesale dealers, to support an exemption of the latter from a license tax imposed upon the former for selling cigarettes, the court adding:

"Why the legislature should have made the distinction" in the statute "is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in *Brown v. Maryland*."

Cook v. Marshall County, 196 U. S. 261, 274-275.

Legislative discretion and policy, as supporting the selection of meat packing houses for the imposition of a

license tax not imposed on establishments engaged in the packing of other provisions.

Armour Packing Co. v. Lacy, 200 U. S. 226, 235-236.

Practical convenience in affixing stamps and enforcing the tax, as supporting a stamp tax imposed only upon the transfer of shares of corporate stocks and fixing the amount of the tax according to the par value of the stock, regardless of its true value.

New York ex rel. Hatch v. Reardon, 204 U. S. 152, 158-159.

Upon the review of decided cases we have shown that the following are among established principles of classification: The function of classification is legislative and the review here is limited to the question whether the classification is "palpably arbitrary," "obviously exercised in a spirit of prejudice and favoritism," amounting to "clear and hostile discrimination"; the legislative discretion in selecting the bases of classification is "very great" and of "wide range"; "the legislature is the only judge of the policy of a proposed classification" and of its "necessity and propriety." In the exercise of this power the "legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole."

The state "is not bound to tax all pursuits or all property"; it may "exempt certain classes of property from any taxation at all"; it "may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them." "The Fourteenth Amendment does not require that state laws shall be perfect." "Classification need

not be scientific nor logically appropriate"; "it suffices if it is practical." "Classification may rest on narrow distinctions"; "they need not be great or conspicuous." "Exact wisdom and nice adaptation * * * are not required by the Fourteenth Amendment nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

"Disparity" of fees not reviewable

A principle which the cases clearly establish and which excludes a large part of counsels' argument here is that: *Once a classification is made upon germane distinctions, the disparity of legislative treatment of the several classes is solely a legislative matter not reviewable by courts.* Counsel call attention to the statement of the Court below that the "disparity" between the license fee required of domestic and of foreign companies "is admittedly very great." Still, it is not so great as that between the treatment of level premium companies and fraternal societies, which are *wholly exempt*. Obviously the greatest disparity of treatment in taxation is presented by the taxation of one class *at all* and the exemption of another *altogether*. And the power of total exemption of a valid class is unquestionable under the decided cases.

The Fourteenth Amendment applies as, at least, equally restrictive of state legislation under the police power. Nevertheless it must be conceded that, having made a valid class of business practices, the restriction or prohibition of which is required for public reasons, the state determines for itself whether it shall prohibit, or restrain, as by license or other burdens. And to sustain prohibition of some evils it is not necessary to prohibit all evils. The legislature has power to classify

criminal offenses according to their nature and gravity, but it is not subject to the Fourteenth Amendment in prescribing penalties for the several classes. It would be novel, we imagine, to hear one convicted of first degree murder complain of denial of "equal protection" under the Fourteenth Amendment by a penalty of hanging in his case, while another convicted of second degree murder was liable to only a short term of imprisonment or a fine, while a third convicted of justifiable homicide goes "scot free."

We submit that it is no province of this Court to hear a representative of a *valid class* complain that the legislature has unjustly treated his class either by imposing relatively higher rates of tax upon his class than upon another or exempting another from taxation altogether. We take it, it is unnecessary for us to burden this brief with citations to the many cases in which this Court has denounced state laws in which *the amount* of tax imposed was small upon the ground that, if the power to tax at all in such cases were conceded, the amount of tax becomes a matter of legislative determination, and as has been so often said "the power to tax is the power to destroy."

If the fact that the amount of discrimination is "not large," will not save a classification not rested on valid bases, then we submit that the cases show that the disparity of treatment *between classes validly made* is no concern of the courts. Counsel proclaim in alarm, that if such is the law, then the Fourteenth Amendment becomes meaningless. They seek erroneously, as we think, to distinguish some of the cases cited by the state court and *Kansas City etc. v. Stiles*, 242 U. S. 111, upon the theory that the statute involved in those cases placed a maximum limit more or less arbitrary on the amount

of the tax which the complaining taxpayer was required to pay.

Of course such is not at all the basis of decision in those cases, which, on the contrary, is merely that the classification made was rested on valid differences of condition, supporting classification and supporting differences of treatment. Nor, on the other hand, were *Southern Railway Co. v. Greene*, 216 U. S. 400, and other cases relied upon by counsel, in which classifications made by state laws were denounced here rested in any degree on the *amount* of disparity of treatment.

It does not follow from this that the Fourteenth Amendment is rendered nugatory. It is the provision of the federal Constitution of possibly the most general and most vital application and effect. Still there are a number of things which are not limited by it. There are some respects in which legislatures are responsible to the people and not to the courts, as has been so often said in effect, and as was recently said here in *St. Louis & S. W. R. R. Co. v. Arkansas*, 235 U. S. 350, 367, 368 (*italics ours*):

“Nothing in the Fourteenth Amendment imposes any ironclad rule upon the states with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, *so long as the inequality is not based upon arbitrary distinctions*” (citing numerous cases).

As already said, state legislatures have the broadest power of classification for taxation purposes. Of the two leading cases in this Court relied upon by the plaintiff to restrict legislative power of classification, *Connolly v. Union Sewer Pipe Co.* and *Cotting v. Kansas City Stock Yards Co.*, *supra*, the following is said in

the opinion of the Court by Mr. Justice Brown, in *Cook v. Marshall County, supra*:

“These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism” (p. 274).

2. *The Classification into Domestic and Foreign Companies is not Arbitrary but Rests upon Valid and Germane Distinctions.*

Among the distinctions and differences of situation as between domestic companies and foreign companies, we wish to call the Court's attention to the following:

Plaintiff's corporate existence and powers are held and enjoyed by it by grant from the state and subject to revocation by the state, whereas the foreign corporation derives its corporate powers from the state of its domicile and is subject in respect to the continued enjoyment thereof to the laws of such state.

In this connection great benefit and advantage accrues to the plaintiff by reason of its domicile in the operation of the Wisconsin retaliatory law. Under this law, plaintiff's home state, by surrendering in large measure the state's right to taxes from foreign corporations, secures to plaintiff and other domestic companies substantial relief from taxation in other states.

Of course, the principal and striking difference of condition and situation as between plaintiff and foreign companies arises from the circumstance that plaintiff is the owner of vast holdings of securities,

intangible personal property, the situs of which for purposes of taxation by the rule of universal application *mobilia personam sequuntur* is at the domicile. The like property of the foreign company on the other hand is presumably taxed under the same rule at its domicile.

Domestic v. Foreign

Coming then to the first of these points, we contend that the circumstances that the state is dealing in one case with its own corporations and in the other case with the corporations of other states is a germane distinction for purposes of classification. We have conceded that the *annual insurance privilege* obtained by paying the license fee is in the form of the statute the same as to domestic and foreign companies. Such concessions, however, do not preclude consideration whether there be differences of situation or condition between the classes by virtue of the circumstance that one is domestic and the other foreign, germane to the object of license taxation.

On this point, we think counsel misread the opinion by the learned Chief Justice of the state Court, when they suggest that the language quoted at the bottom of page 82, of plaintiff's brief, shows that the state Court regarded the mere difference that one class is domestic and the other class is foreign as an unsubstantial difference.

“The disparity between the annual license fee required of domestic companies by the law in question, and the fee required of foreign companies is admittedly very great and the question arising is simply, whether there is any substantial difference, other than the difference between foreign and domestic

corporations, which differentiates the two classes and which justifies such great difference in treatment." (Trans. p. 4.)

While the opinion below is not rested expressly on this difference, we submit that the language "any *substantial difference*, other than the difference between foreign and domestic corporations," clearly implies that such difference is regarded as substantial. We submit that this is a substantial difference warranting classification for the purpose of imposing greater tax burdens on the home company.

The plaintiff, as a domestic corporation, stands in a relation of greater obligation to the state than do foreign companies deriving their corporate powers and privileges from other states. Under the laws of this state, plaintiff has its being as a legal person entitled to all the advantages of corporate capacity, privilege and perpetual succession. By virtue of the laws of this state, it claims recognition as a "person," not only under the state constitution and laws, but under the constitution of the United States. Its right and privileges so derived are in many respects not confined at all by the territorial boundaries of the state. To a large extent, also, it derives from the laws of this state not only its power to own and hold its vast accumulations of wealth, but also the protection of government for its property and preservation of its legal rights therein.

Moreover as to the domestic company the license fee may be justified entirely as an exercise of the power reserved to the state by its constitution to alter or repeal the corporate charter of every domestic corporation.

The reserved power is declared in the state constitution in the following language:

Section 1. "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage." (Art. XI.)

Whether the license fee statute be regarded as actually an exercise of the reserved power, it must be quite apparent in that the existence of this power as to domestic corporations is a profound difference of situation as between domestic and foreign companies. The case is in this regard within the principle of *Kansas City etc. R. Co. v. Stiles*, 242 U. S. 111, 117-118. To paraphrase the language there, the plaintiff accepted its charter and entered upon its business and has continued it from year to year since with the constitutional reserved power before it and cannot be heard to complain of the terms under which it voluntarily invoked and received the grant of corporate privileges from the state of Wisconsin. As was there said:

"There is no denial of equal protection of the laws because a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them."

The constitutional reserved power has been asserted and exercised by the state from the inception of the state government and has been given full scope in the decisions of the state court.

- Madison etc. Plankroad Co. v. Reynolds*, 3 Wis.
287, 296;
Pratt v. Brown, 3 Wis. 603, 611, 615-616;
Nasro et al. v. Merchants' Mutual Ins. Co., 14
Wis. 295, 299-300;
Kenosha, R. & R. I. R. R. Co. v. Marsh, 17 Wis.
13, 17;
Whiting v. Sheboygan & F. R. Co. et al., 25 Wis.
167, 198;
Pick v. Rubicon Hydraulic Co., 27 Wis. 433, 440;
State v. Milwaukee Gaslight Co., 29 Wis. 454,
461;
Chapin v. Crusen, 31 Wis. 209, 215;
West Wis. R. Co. v. Trempealeau Co., 35 Wis.
257, 270-271;
Attorney General v. Railroad Cos., 35 Wis. 425,
569-574, 576, 579;
State ex rel. Cream City Ry. Co. v. Hilbert, 72
Wis. 184, 192-194, 195;
Ashland v. Wheeler, 88 Wis. 607, 616;
Chicago M. & St. P. Ry. Co. v. Milwaukee, 97
Wis. 418, 422, 435;
State v. Railway Cos., 128 Wis. 449, 505;
Manitowoc v. Manitowoc & N. Tr. Co., 145 Wis.
13, 28-29;
La Crosse v. La Crosse G. & E. Co., 145 Wis. 408,
415, 417.

In this Court such reservations to the legislature of power to alter, amend or repeal corporate charters or laws under which corporations are formed are, in the absence of any contrary and restricted construction previously promulgated by the highest Court of the state, held to reserve the power to alter or amend all

franchises or privileges granted, directly or indirectly, by the state to corporations.

Tomlinson v. Jessup, 15 Wall. 454;

Sinking Fund Cases, 99 U. S. 700, 730;

Close v. Glenwood Cemetery, 107 U. S. 466, 477,

Shields v. Ohio, 95 U. S. 317, 324;

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 353, 356;

Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 270;

Northern Central R. Co. v. Maryland, 187 U. S. 258, 268-269;

Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 211-213;

Fairhaven R. Co. v. New Haven, 203 U. S. 379, 388-390;

Calder v. Michigan, 218 U. S. 591, 600;

Matthews v. Corporation Commrs., 97 Fed. 400, 404.

Retaliatory Laws

In the circumstances that the state has, for the benefit of the plaintiff and other domestic companies, adopted the retaliatory law, section 51.33 (formerly section 1221) is found a further difference of situation supporting classification as between foreign and domestic companies. By this statute and by imposing otherwise on foreign companies an annual license fee of only \$300 (instead of 3% of their Wisconsin premiums receipts, as plaintiff's argument here suggests) the state secures for its domestic companies substantial remission of taxation in other states. This statute provides as follows:

Section 51.33 (formerly section 1221). "Whenever the laws of any other state of the United States shall require of life, fire, accident, or inland navigation insurance companies organized under the laws of this state and doing business in such other state any deposit of securities for the protection of their policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by the laws of this state for the same purposes from similar companies organized under the law of such other state and doing business in this state, then all such companies of such other states doing business within this state shall make the same deposit with the state treasurer and shall pay him the same sum for taxes, fines, penalties, certificates of authority, license fee or otherwise as a condition to the issue of a license to them as is required to be paid by the laws of such other state."

With respect to the universality of such laws, plaintiff alleges:

"That in the year 1907 there was and ever since has been in force in every state of the United States under whose laws any life insurance companies have been organized which have been licensed to transact business in Wisconsin, statutes similar to section 51.33, Wisconsin statutes above quoted." (Trans. p. 29.)

Of course, plaintiff's case here is not aided by the allegation (Trans. p. 30) or argument (Plaintiff's brief p. 98) to the effect that some *other* domestic companies do not transact business in other states having companies doing business in Wisconsin. Plaintiff cannot have the constitutionality of the law reviewed here except upon grounds which affect it.

Giles v. Little, 134 U. S. 645;

McNulta v. Lockridge, 141 U. S. 372;

Engel v. O'Malley, 219 U. S. 128, 135;
Citizens Tel. Co. v. Fuller, 229 U. S. 322, 332;
German Alliance Ins. Co. v. Kansas, 233 U. S.
389, 418.

Counsel testify (Plaintiff's brief pp. 101-102) to the attempt of the legislature in 1905 to impose a 3% tax on foreign companies and to its abandonment of that effort in view of the resulting tax burdens on Wisconsin companies in other states. By ch. 455, laws of 1905, sec. 1220 of the statutes was amended to impose a three per cent license fee tax on the premium receipts of foreign companies upon policies written on the lives of residents of this state, effective January 1, 1908. So earnest and effective was the protest of domestic companies against this legislation that the legislature of 1907, by ch. 656, laws of that session, repealed the act of 1905 before it became effective.

Referring to the connection of the plaintiff with the history of this legislation, the commissioner of insurance in his official report for 1908, states (italics ours):

"At present, insurance companies from other states pay to this state little more than a nominal tax. Attempts have been made to correct this and impose upon companies from foreign states a larger tax and each time the home company, to avoid retaliatory laws of other states, has opposed such attempts. At the last session it led the fight which resulted in the repeal of a law enacted at the previous session for imposing a higher tax upon the foreign companies. Its principal argument was that the collection of such higher taxes from foreign companies would result in the imposition on it of retaliatory taxes which would increase its taxes to more than \$2,000,000" (p. 30).

The official report of the commissioner of insurance is prepared and published pursuant to requirement of law. At the time of the above report and since sec. 1972b of the Wisconsin statutes provided:

"Section 1972b. The commissioner of insurance shall keep and preserve in a permanent form a full record of his proceedings, * * * and shall, annually, at the earliest practical date make a report to the governor * * * which report shall also contain:

"(1) * * *

"(2) * * *

"(3) Any amendments to the statutes relating to insurance which in his judgment may be desirable, and such other information and comments in relation to insurance and the public interest therein as he deems fit.

"(4) * * *

"There shall be printed and in readiness for distribution two thousand copies of such report for the use of the governor, legislature and department of insurance; * * *"

This account of the history of this legislation is, quite illuminating, we submit, of the substantial difference of situation as between domestic and foreign companies warranting classification by the state for license fee taxation.

The criticisms offered by counsel for plaintiff of such retaliatory laws were considered here and the validity of such legislation affirmed by this Court in

Philadelphia Fire Assn. v. New York, 119 U. S. 110.

Indeed, counsel feel constrained to concede its validity (Plaintiff's brief p. 94) citing:

Home Ins. Co. v. Swigert, 104 Ill. 653;

Phoenix Ins. Co. v. Welsh, 29 Kans. 480;

People v. Fire Assn., 92 N. Y. 311.

Counsel's argument that the retaliatory law does not operate to *equalize* the tax (Plaintiff's brief pp. 95-96) missed the point. While its effect as to Wisconsin taxation of foreign companies, when its operation is invoked by the higher taxation of Wisconsin companies by other states, is to reduce the disparity between Wisconsin taxes on domestic and foreign companies, as noted by the court below (Trans. p. 6), this is not its prime significance. The point is that the retaliatory law exhibits a substantial difference of situation as between domestic and foreign companies germane to taxation of the two classes by the state and warranting classification for that purpose. By virtue of such law and of the diversity of domicile, the state may and has (apparently at the instance, certainly in the interest, of the "home company") by largely remitting state taxation of foreign companies, secured to plaintiff and other Wisconsin companies remission of taxes in foreign states perhaps greater than their entire domestic taxation.

If ch. 455, Wisconsin laws of 1905 (Plaintiff's brief pp. 101-102) would have resulted in plaintiff paying a tax of 3% on its premium receipts in other states, it would have paid as such taxes in foreign states on its premium receipts of 1911 more than twice the amount of its tax to Wisconsin for that year. Of course, it is palpable error for counsel to say of ch. 455, laws of 1905, that "In virtue of the retaliatory laws of other states, this would have operated as had the Orton Law, to subject the plaintiff to double taxation on its nonresident premium receipts." Not only has the state never since 1901 taxed at all plaintiff's foreign premium receipts, but through the operation of its retaliatory law and its low taxation of foreign companies, it has se-

cured substantial exemption thereof from taxation by other states.

While the state court found other differences of situation sufficient to support the classification as between domestic and foreign companies, and, therefore, did not pass upon the situation as affected by the retaliatory law, we submit that this is a situation worthy of and proper to be considered by this Court in reviewing the result reached by the state court.

Location of Reserves

Having in view the dual nature of the license fee, as not merely an occupation tax but also an exaction in lieu of personal property taxation (upon which we have heretofore dwelt at some length) it becomes at once apparent that the difference in taxable situs of the property exempted in consideration of the license fee constitutes a profound difference of situation warranting classification as between domestic and foreign companies. Primarily upon this consideration, the decision of the state court approved the classification as between domestic and foreign companies. The statement of the Court's opinion by Mr. Chief Justice Winslow upon this point is succinct and convincing (*italics ours*):

"In approaching this question it is important to note at the outset that the license tax in question is levied *in lieu of all other state taxes* except taxes on real estate owned by the company. It covers all the contributions which the state demands from the company or its business except real estate taxes which are relatively small in amount. It is common knowledge that all of the great level premium insurance companies of the present day have vast reserve funds, to protect their liabilities on policies, running up into the hundreds of millions of dollars

and that these reserves are invested in interest bearing securities of which real estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real estate mortgages amounting to \$153,562,654.39 of which only \$5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real estate mortgages for the year ending on said last named date amounted to \$7,446,393.10 and its income from bonds to \$3,172,489.58. *These securities are all credits, i. e., personal property of an intangible character the situs of which for the purposes of taxation is in this state at the residence of the corporation.*

"The power of the state under the constitution to levy occupation taxes in the shape of license fees in lieu of other taxes can not now be questioned. *C. & N. W. R. Co. v. State*, 128 Wis. 589; *Nunne-macher v. State*, *supra*. Having determined on the license system of taxation for all life insurance corporations the state faced this situation: on one hand were the domestic level premium companies (of which the plaintiff is by far the most conspicuous example) having their reserves invested in securities or credits, all of which were not only taxable in Wisconsin but should, in justice to other taxpayers, contribute to the expenses of the government which created and protects their owners; and on the other hand were the foreign level premium companies also having great reserves practically none of which were taxable in Wisconsin and which were presumably subjected to just and adequate taxation in their respective domiciles. The essential difference was not the difference in residence but the difference in the location for taxing purposes of the reserves. *This difference is certainly a very real one, germane to the subject of license fee taxation*, and it plainly suggests, if it does not indeed demand, some substantial difference of treatment in the matter of the amount of the fees exacted. It would be indefensible to subject both

classes to the merely nominal fee of \$300, thus allowing the great reserves of the local companies to escape taxation entirely, and it would be equally indefensible to exact of both classes a fee large enough to accomplish just taxation of the domestic company. The first course would practically exempt from taxation a very large volume of the state's taxable property, thus increasing the burdens of all other taxpayers, and the second course would probably bar out every foreign life insurance company from the state, and either course would manifestly give to the domestic companies a very great advantage over foreign companies doing the same business.

"Plainly, the only course which could be followed if just taxation were to be approximated under the license system of taxation, was a course which should in some way compel the domestic company to make a fair contribution to the support of its home government, while recognizing and allowing for the fact that presumably every foreign company is compelled by its home state to do substantially the same thing.

"Whether this be done by personal property taxation, by income taxation or by license fee taxation was, we think, a question for the state to decide. We are unable to say that the state has not acted within the bounds of reason in fixing the license fees in the present case. It seems quite certain that a personal property tax would have exacted far larger contributions from the plaintiff to the public revenues than the license fee provided by this law" (Trans. 5-6).

By the rule *mobilia*, universally recognized, the situs of such personalty for taxation is the domicile of the owner.

State Tax on Foreign-held Bonds, 15 Wall. 300;

Kirtland v. Hotchkiss, 100 U. S. 491;

Bullen v. Wisconsin, 240 U. S. 625;

Keeney v. New York, 222 U. S. 525;

Matter of Keeney, 194 N. Y. 281;
Matter of Swift, 137 N. Y. 77;
Matter of Corning, 23 N. Y. S. 285;
Matter of Cornell, 170 N. Y. S. 423;
Matter of Dingman, 72 N. Y. 694;
Prothingham v. Shaw, 175 Mass. 59;
Gallup's Appeal, 76 Conn. 617;
Hopkin's Appeal, 77 Conn. 644;
Mann v. Carter, 74 N. H. 345;
Re Hartman, 70 N. J. Eq. 664;
Lines' Estate, 155 Pa. 378;
Milliken's Estate, 206 Pa. 149;
People v. Union Trust Co., 255 Ill. 168;
Douglas County v. Kountze, 84 Neb. 506, 121 N.
W. 593;
37 Cyc. 955.

The rule *mobilia* is the law in Wisconsin.

State v. Gaylord, 73 Wis. 316, 325.

So far as we are aware or counsel suggest the rule has never been departed from there. Nor does it impeach the principle or the decision of the state court that in one or two fugitive cases on special facts laws of other states taxing credits at the domicile of the debtor have been sustained, not upon the *situs* but upon the theory that the state of the debtor's domicile could tax the credit because recourse to its law might be had to enforce the debt.

That difference in location of the reserves, as between domestic and foreign companies, is a distinction which is substantial and which is germane in the imposition of a license fee which is "in lieu of all taxes for any purpose authorized by the laws of this state," except on real estate (sec. 1220b), would seem hardly to require

argument or the citation of authorities. This precise distinction was recognized as a valid basis for classification for excise taxation in *Kidd v. Alabama*, *Brown-Forman Co. v. Kentucky*, and *Pacific Exp. Co. v. Seibert*, *supra*.

So far as concerns the *amount* of tax imposed upon the plaintiff as a license fee tax and an exaction in lieu of property taxation, the policy of this legislation must be characterized as one of great liberality to the plaintiff. This statement is amply borne out by the report of the state commissioner of insurance, above referred to, for the year 1908, in which the commissioner, referring to the plaintiff company, states (*italics ours*):

"The same company has of late been making much complaint of the taxes paid in Wisconsin with little result, if any, other than possibly to injure its Wisconsin business. Its principal argument seems to be that it paid to Wisconsin in 1907 a tax of \$1,000 per day or in all \$367,726. This statement should be supplemented by one which the company fails to make that the Wisconsin policyholders only bear their proportion of this tax and that the aggregate taxes are over \$2,000 per day or \$803,252, and that this is all the taxes it pays upon assets amounting to \$232,819,246. This is at a rate of .344 per cent on its assets. The railroad property of the state, which is taxed on the same basis as all other property, on a valuation of \$267,861,500, which is but little above the assets of the insurance company, paid a tax the same year of \$3,083,720, at the average state rate of 1.151 per cent. *At the same rate, the property of the insurance company would have borne a tax of \$2,669,749 instead of a total of all taxes, licenses and fees of \$803,252.* It should be emphasized that these taxes are distributed upon all the policyholders and that the Wisconsin policyholder bears no more than the one outside of Wisconsin.

"It is well to note that the greater part of the

taxes paid by this company to Wisconsin is a 3 per cent tax upon its income from investments and hence indirectly a tax upon its property. The tax statement of this company for 1907 shows an income of \$43,645,415 and an income of \$12,176,787 subject to the Wisconsin tax of 3 per cent. Of this, the Wisconsin premium collections amounted to \$2,441,681 and the remaining or \$9,735,106 subject to the tax, came from interest on investments. As the average interest rate reported by the company is 4.76 per cent, the tax against the interest income figured separately is equal to .143 per cent or less than one-seventh of one per cent on the principal on which this interest was earned. *The average tax rate for 1907 of 1.151 per cent fixed by the tax commission in the state for other property is eight times the rate paid by the assets of this company*" (pp. 29-30).

A computation based upon the state tax rate, as published by the tax commission and the published reports of plaintiff's business and assets for any other year, will show substantially the same results as the computation above quoted from the insurance commissioner's report.

Being confronted with the showing that, in view of the exemption of its vast personal property holdings, plaintiff was greatly favored and not discriminated against by the license fee law as compared with the rule of property taxation, applying generally, plaintiff set up the claim below that it was entitled, under the rule of property taxation to deduct its policy obligations as an offset to its credits.

The same contention in slightly varied form is made here.

The statutes of the state here pertinent are sections 1034, 1036 and 1038, Stats. 1898, and acts amendatory thereof.

Section 1034, Stats. 1898, provided that:

“Taxes shall be levied upon *all property* in this state except such as is exempted therefrom.”

This language is broad enough to include personal property in the form of credits. Nevertheless the legislature, by section 1036, Stats. 1898, defined personal property, as used in the statutes relating to taxation, expressly to include

“all debts due from solvent debtors, whether on account, note, contract, bond, mortgage or other security, or whether such debts are due or to become due.”

By section 1038, Stats. 1898, the classes of property exempt from taxation are defined, and there is exempted by subsection 10 thereof

“so much of the debts due or to become due to any person as shall equal the amount of *bona fide and unconditional* debts by him owing.”

It is this provision of the statutes, entitling the tax payer to have deducted from the amount of credits for which he is assessed the amount “of *bona fide and unconditional* debts by him owing,” to which the plaintiff’s argument refers.

These sections of the statutes, sections 1034, 1036 and subsection 10, section 1038, Stats. 1898, were in force in substantially this form from the foundation of the state and have been held valid by the state court.

Kingsley v. Merrill, 122 Wis. 185, 190.

The amended complaint, in effect, concedes the character of plaintiff’s personalty as of the class of personal property defined in section 1036 as generally taxable

in this state, except for the exemption provided in subsection 10, section 1038, above quoted.

Plaintiff's contention on this point is *conclusively* disposed of by the opinion of the court below on the amended complaint. The state court, speaking again through Chief Justice Winslow held:

"Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as 'shall equal the amount of bona fide and unconditional debts by him owing.' This provision was repealed by the income tax law which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Session laws 1911, chapter 658.

"It seems entirely clear that the liability to policyholders which the plaintiff refers to is not in any sense an 'unconditional debt' and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made" (Trans. p. 52).

The decision below is in harmony with the prior decisions of the state Court.

Perrigo v. Milwaukee, 92 Wis. 236;

Weston v. Supervisors, 44 Wis. 242.

There is no warrant for counsels' argument that, had taxation of credits been applied to insurance company reserves, policy obligations would have to be deducted to save constitutional objections. For the state "may tax visible property, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them."

Bell's Gap Railroad Co. v. Pa., 134 U. S. 232, 237.

If the state may do that, it certainly may draw a line between the bona fide and unconditional debts which it allows, and contingent, remote or speculative obligations which it will not allow to be deducted.

Plaintiff also tries to make a point that its license fee is more than it would have to pay under the income tax law—not the Wisconsin income tax law but some other law which counsel are pleased to refer to or imagine (Plaintiff's brief, pp. 113-117). Counsel, while printing in their brief excerpts from the Wisconsin income tax law omit provisions prescribing the rates of tax on corporate income. These provisions as in force in 1911 and 1912 were as follows:

“Providing, however, that the tax to be assessed, levied and collected upon the incomes of corporations, joint stock companies or associations, after making due allowance for deductions as hereinbefore provided, shall be computed at the following

* The decision of the state Court that the plaintiff's reserve liability is not *bona fide* an unconditional debt entitled to be deducted is in harmony with the decision of this Court in *McCoach v. Insurance Company of North America*, 244 U. S. 585, 589, where the Court refers to such reserve liability as a “contingent liability on outstanding policies” as *contra* distinguished from fixed or unconditional liability for losses accrued.

“(e) If the taxable income equals more than four, but does not exceed five per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be two and one-half per cent of such income.

“(f) If the taxable income equals more than five, but does not exceed six per cent of the assessed value of the property used and employed in the acquisition of such income, the rate of the tax shall be three per cent of such income.

“(g) And in like manner the tax upon the taxable income shall continue to increase at the rate of one-half of one per cent for each additional one per cent or fractional part thereof that the taxable income bears to the assessed value of the property used and employed in the acquisition of such income, until the rate of profits equals twelve per cent of such assessed value of the property used and employed in the acquisition of such income, when such rate shall continue as a proportional rate of six per cent of such taxable income.” Sec. 1087m—6, subsec. 2.

As amended by ch. 720, laws of 1913, this section reads:

“2. The taxes to be assessed, levied and collected upon the incomes of corporations, joint stock companies or associations, after making such deductions and exemptions as hereinbefore allowed, shall be computed at the following rates, to wit:

“On the first \$1,000 of taxable income or any part thereof, 2½% ;

“On the second \$1,000 or any part thereof, 2½% ;

“On the third \$1,000 or any part thereof, 3% ;

“On the fourth \$1,000 or any part thereof, 3½% ;

“On the fifth \$1,000 or any part thereof, 4% ;

“On the sixth \$1,000 or any part thereof, 5% ;

“On the seventh \$1,000 or any part thereof, 6% ;

“On all taxable income in excess of \$7,000, 6%.”

While the income tax law became, in effect, a substitute for general property taxation of credits, and in

a sense also in part for the taxation of other personal property, insurance companies and other corporations paying license fees to the state were exempted from the new tax as they had been exempted from the old tax. Subsection 3, section 1087m—4.

The complaint, after referring to this development in the general taxation system of the state, sets forth the amount at which plaintiff's income has been assessed and taxed under the federal corporation tax law, and under the federal income tax law. We submit, however, that the manner in which insurance companies are taxed or in which the tax on insurance companies is measured, either by the laws of the United States or of any other state, is not material upon this point.

The complaint does not set out, in sufficient detail, the facts and figures to permit of a computation of the amount of tax which plaintiff would pay if it were taxed under the income tax law, ch. 658, laws of 1911. It does, however, appear that plaintiff's income, upon which it paid the tax for 1911, was the sum of \$16,073,107.76, and that all of this income, except \$2,836,488.04, Wisconsin premium receipts, was interest on bonds, notes and mortgages and all taxable in Wisconsin under the income tax law, ch. 658, laws of 1911, subsection 3, 1087m—2, Stats. This subsection provides:

“So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state.”

Assuming, but not conceding, that from this investment income of \$13,236,619.72, there could be deducted, under the income tax law, the alleged expense of the plaintiff's investment business, as stated in the com-

plaint, amounting to \$755,764.18, there would remain a net taxable income from bonds, securities and evidences of indebtedness, all of which, without apportionment, would be taxable in Wisconsin under the income tax law, amounting to \$12,480,855.54 from investments alone.

While under the license fee law, section 51.32 (formerly section 1220), there is included, in measuring the tax, only plaintiff's premium income received in the state and amounting to \$2,836,488.04, under the income tax law plaintiff's entire premium income of \$40,421,263 (Table II, Trans. p. 42) less deductions allowed by the law, would be *apportioned* for taxes on the basis of business done and property owned in the state. Subsec. 3, sec. 1087m—2 (Plaintiff's brief, p. 139); subd. (e), subsec. 7, sec. 1770b, Stats.

Subdivision (e), subsection 7, section 1770b, Wisconsin statutes, above referred to prescribes a rule or method of apportionment as follows:

"In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the entire property of the corporation, both within and without the state, added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state."

As all, or practically all, of plaintiff's property is in its home state and all of its business with Wisconsin policyholders, and in large part its business with non-

resident policyholders, is done in that state (*U. S. Glue Co. v. Town of Oak Creek*, 161 Wis. 211), it is not improbable that its taxable life insurance business income would, under the income tax law, greatly exceed the amount of its Wisconsin premiums (\$2,836,488.04) plus expenses of investment business (\$755,764.18) included in its taxable income, in addition to interest receipts, under the license fee law. Certainly it does not appear from the complaint, nor do we think it could be shown that the amount of plaintiff's taxable income, as taxed under the license fee law, was more than would have been taxable under the income tax law.

The tax paid and complained of is at the rate of three per cent on the taxable income as determined by the license fee law. We think, it may be considered as not improbable that plaintiff's rate under the income tax law as enacted in 1911 would have been three per cent or more. Under subsection 2, section 1087m—6, as originally enacted, the rate would have been three per cent if the plaintiff's taxable income amounted to more than five per cent and less than six per cent of the "assessed value of the property used and employed in the acquisition of such income"—whatever that might be determined to be—and increasing with the increase in rate of return. Under the income tax act, subsection 2, section 1087m—6, in its present form, as amended by chapter 720, laws of 1913, the plaintiff's rate would be three per cent and over on all of its taxable income over two thousand dollars in amount, and would doubtless average nearly or practically six per cent on the plaintiff's entire taxable income as it might be determined under that law.

We submit that, in view of the foregoing considerations, there is no warrant for a claim that plaintiff is

unjustly treated in the tax imposed by the license fee law upon its income from its investment business, and that by virtue of the exemptions which plaintiff enjoys, not only from personal property taxation but also from taxation under the income tax law, it is probable that plaintiff pays much less than the ordinary individual or domestic corporation owning the same property and deriving the same income therefrom would be required to pay under the income tax law.

The conclusion reached by the state Court, thoroughly conversant as that court is with the taxing laws and the operation of the taxation system of the state, should be accepted here.

“As to the contention that if the plaintiff were taxed under the income tax system its tax burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.” (Trans. p. 52.)

Concluding upon this feature of the case, we submit that there are substantial distinctions germane to license fee taxation imposed as occupation taxation and in lieu of property or income taxation amply supporting classification as between domestic and foreign insurance corporations. Such distinctions are:

Domestic companies derive all their corporate powers from the state subject to be altered, conditioned or revoked as the state shall see fit and, as such corporations existing under the laws of the state, are enabled to claim rights and privileges even without the state.

Domestic companies, by the operation of retaliatory laws and other laws of the home state, coupled with its large remission of taxes on foreign companies, are protected by the home state from taxation in other states and are thus saved perhaps more than the entire tax imposed upon them by the home state.

Domestic companies by virtue of the license fee statute and in consideration of paying the license fee thereunder, enjoy exemption from taxation on hundreds of millions of personal property owned and held by them in the state and exemption from income taxation on their millions of income from such property, whereas such property or income of foreign companies is outside the jurisdiction of the state to tax, but is presumably taxed at the domicile of the foreign company.

*3. The Exemption of Fraternal Societies is not Arbitrary
but is a Reasonable Exemption Based upon
Valid Bases of Classification.*

It is matter of common knowledge and general acceptance that fraternal societies and lodge orders are organized and maintained by their membership primarily, and in many instances exclusively for benevolent, charitable, social and patriotic purposes and for the inculcation among their membership of the teachings of fraternalism. Of course such institutions are fundamentally different from the modern life insurance corporations, even of the so-called mutual form. Moreover, if only the insurance or beneficiary side of fraternal societies be compared with "old line" life insurance there are substantial differences of situation and condition which warrant legislative classification as be-

tween old line companies and fraternal societies for purposes of license fee taxation.

Counsel for the plaintiff in their argument on this branch of the case proceed, as it seems to us, along clearly wrong lines; they institute a comparison not as between the insurance companies and fraternal societies but between insurance companies and the insurance or benefit feature merely of fraternal societies. Taking fraternalism at large, the insurance or benefit feature, while large in the aggregate, is comparatively a minor incident of lodge fraternalism in this country. Counsel assert the contrary, of course, and that the fraternal society is only an insurance enterprise disguised with a lodge organization, adopted in counsel's view, we suppose, in order to escape taxation. As for facts or proofs counsel refer to a paragraph in the complaint (Trans. p. 32-33) the allegations of which are mere general conclusions and argument. At page 123 of their brief counsel say the state court misconceived the facts pleaded in treating the fraternal feature as predominant, and they quote a part of the paragraph from the complaint above referred to and make the amazing assertion that "this averment of the predominating characteristics of fraternalism is one of fact, admitted by the demurrer."

That paragraph from the complaint in full, not as counsel abridge it on their brief, reads as follows:

"That the essential and predominant feature of all the insurance companies and associations hereinbefore referred to is the same, being the payment of a definite sum to a designated party or beneficiary on the death of the person whose life is insured; that the presence or absence of social, charitable, benevolent or lodge features in the organization, or the particular plan or method of organization, or the place of organization of the corporation,

or association, whether under the laws of the state of Wisconsin or under the laws of any other state, is not a distinguishing feature in the life insurance business, nor does any such or similar distinction form a basis for a classification of such companies so as to justify a discrimination in the standard and method of taxation to be imposed upon them." (Trans. pp. 32-33.)

To allege that the presence or absence of charitable or benevolent features in the organization or the like "is not a distinguishing feature" or does not "form a basis for the classification" for taxation certainly is not an allegation of fact. It is no more or less than argument of the plaintiff's case on the complaint. In Wisconsin, at least, such allegations are not admitted by demurrer, as the state court well appreciated.

The state Court clearly did not misconceive "the facts pleaded." So far as facts were pleaded which were material, the court doubtless gave to them such weight and consideration as was proper. But the court *was not concluded* by the pleadings. It had the right to, and did, consider matters of common knowledge and matters of which it might take judicial notice. In the light of such matters the state court had no difficulty in meeting the contention that the classification of fraternal societies differently from level premium insurance companies was unlawful discrimination. The court said, "We do not feel that we should be justified in consuming any considerable amount of time or space in meeting this contention." The conclusion of the state Court is tersely stated in the following paragraph from the opinion:

"That there is much difference of condition between the great level premium company with its great reserves and the ordinary fraternal benefit

association can not be questioned. That the differences are such as to justify classification and difference of treatment so far as license taxation is concerned seems to us quite evident. The level premium company is purely a business concern; the true fraternal benefit association is a banding together of many groups of neighbors primarily for social purposes but with the further idea of rendering mutual help in misfortune, sickness or death and inculcating the principles of brotherhood among the members. Such associations have no great expense account, they conduct the insurance feature of their organization at comparatively small cost and they have no such immense volume of reserve funds. Probably the lodge organization is their most marked differentiating characteristic. It is this characteristic which the legislature has chosen as decisive of their character, and we do not feel that we can say that the choice was made without reason. It avails not to say that there may be some instances where the lodge organization is almost or quite a pretense and the supposed fraternal association really approaches very closely to an insurance company. Nearly all classification possesses this defect. Individual cases near the border line on either side often present no differences worthy of notice but this does not invalidate the classification. It is the class, considered broadly as a class, which must possess the substantial differences suggesting the propriety of different legislative treatment, not every individual of the class. The principle is familiar." (Trans. p. 7.)

The classification of fraternal beneficiary societies as distinct from insurance companies is fundamental and is one that has long been recognized in the statute law of the state. It was recognized at least as early as 1879 when the legislature of that year enacted a law (ch. 204) declaring "The secret, beneficiary, charitable and benevolent orders," designating by name some thirty-six such orders, "are hereby declared not to be life in-

insurance companies, in the sense and meaning of the general laws of this state relating to life insurance companies, and such societies, orders and associations are and shall hereafter be exempt from the provisions of said general laws aforesaid.”

The distinction has been repeatedly recognized by the legislature in the enactment of legislation with respect to such associations differing in character and effect from the legislation in force applying to life insurance companies.

Ch. 334, Laws 1889; Ch. 418, Laws 1891;
Ch. 440, Laws 1891; Ch. 175, Laws 1895;
Sec. 1955a, Stats. 1898; Ch. 21, Laws 1901;
Ch. 357, Laws 1905; Ch. 511, Laws 1907;
Ch. 447, Laws 1907; Ch. 175, Laws 1911;
Ch. 210, Laws 1911; Ch. 216, Laws 1911;
(Secs. 1956 to 1959, Stats. 1913); Ch. 251, Laws
1913, (Sec. 1959, subd. 22m).

The language of the exception in section 1220, enacted as ch. 21, laws of 1901, which exempts fraternal societies from the license fee imposed by that statute is “such fraternal societies as have lodge organizations and insure the lives of their own members and no others.”

By this language the legislature intended to refer to a class of societies or associations well known to it as social, fraternal, benevolent and to some extent charitable in character, organized and promoted largely for the purpose of fostering objects of that character, including, also, and generally, patriotism and morality. These organizations, in varying degree and as a part of their institutional activities, undertook, through dues and assessments levied upon their members and subject to their own rules and laws, to provide for their members

and their dependents a varying degree of financial relief and protection against the misfortunes of sickness and death, in some respects analogous to disability and life insurance. The business as well as the social and charitable affairs of these organizations are conducted and managed largely directly by the members themselves through their lodge meetings, and their general and larger affairs by representatives chosen by the members at such meetings. This, in general, was the character of the associations in the mind of the legislature when it used the words "fraternal societies" having "lodge organizations."

It was not unnatural that the popularity of such institutions of a legitimately fraternal character would tempt some persons, desiring to organize and promote insurance schemes for motives largely mercenary, to adopt fraternal names and forms for assessment insurance schemes without real fraternal and benevolent objects. Such, however, the legislature did not have in mind and sought, perhaps imperfectly, to exclude them from the exemptions from taxation and regulation by incorporating in the definition of societies exempted the requirement of a lodge organization and insurance benefits limited strictly to the membership. As the likelihood of evasion in that regard increased, the legislature has provided more restrictions and limitations upon the statutory definition of fraternal benefit societies with a view to limiting the privileges and exemptions to such as are genuinely fraternal and benevolent. By the enactment of chapter 216, Laws 1911, section 1956 was incorporated into the statutes defining the term "fraternal benefit society":

"1. Any corporation, society, order or voluntary association, without capital stock, organized and

carried on *solely for the mutual benefit of its members or their beneficiaries*, and having a lodge system with *ritualistic form of work and representative form of government*, and which makes provision for the payment of death or disability benefits, or for both, is hereby declared to be a 'fraternal benefit society,' which shall be held to be synonymous with a 'mutual benefit society.' Domestic societies licensed to do business in this state as fraternal benefit societies on the first day of May, 1911, shall be considered within this subsection.

"2. Any such society having a supreme governing or legislative body, and *subordinate lodges or branches* by whatever name known, *into which members shall be elected, initiated, and admitted* in accordance with its constitution, laws, rules, regulations, and *prescribed ritualistic ceremonies*, which subordinate lodges or branches shall be required by the laws of such society to *hold regular or stated meetings* at least once in each month, shall be deemed to be operating on the lodge system.

"3. (a) Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of *representatives elected* either by the members or by delegates elected directly or indirectly by the members,
• • •"

This definition, while it safeguards by express statutory limitations the definition of a fraternal society, really adds nothing to the meaning of that term as used in section 1220 either as a restriction on the legislative intent or upon the practical administration of that statute. Such has always been the effect given to the term "fraternal societies" in the practical administration of the statute.

Not only is the distinction between fraternal benefit societies, as engaged in the furnishing of life and disability insurance to their members, and the so-called

"old line" life insurance companies observed for many years in the statutes of Wisconsin for purposes of regulation and taxation, but that distinction is one observed practically universally throughout this country.

At least forty-two states of the Union in their statutes and Congress in legislating for the District of Columbia expressly recognize this distinction.

- Alabama, Act No. 476, p. 700, Laws 1911;
- Arizona, Art. IV, H. B. 23, ch. 94;
- Arkansas, Act 186, p. 328, Laws 1899;
- California, ch. 682, p. 1320, Laws 1911;
- Colorado, ch. 99, p. 332, Laws 1913;
- Connecticut, ch. 185, p. 1785, Laws 1913;
- District of Columbia, Code, subch. 12, sec. 749,
et seq.;
- Florida, ch. 4380, Acts of 1895, sec. 8, p. 147;
- Georgia, Act No. 105, p. 71, Acts 1900;
- Idaho, ch. 225, Laws 1911, p. 710;
- Illinois, Laws 1901, p. 223;
- Indiana, ch. 117, p. 177, Acts 1899, sec. 1, *et seq.*;
- Iowa, sec. 1822, Stats. 1897;
- Kansas, sec. 3502, Stats. 1905;
- Louisiana, Act No. 256, Laws 1912, p. 565;
- Maine, Laws 1901, p. 263, ch. 247-1;
- Maryland, Stats. 1912, ch. 824-1A, *et seq.*, p. 1599;
- Massachusetts, ch. 628, Laws 1911, p. 690;
- Michigan, Act 169, Laws 1913, p. 297, subsec. 1,
et seq.;
- Minnesota, ch. 321, Laws 1907, p. 434; ch. 345,
Laws 1907, p. 469;
- Mississippi, Stats. 2638 and 2637 (2345), p. 790,
Stats. 1906;

Missouri, sec. 1408, Laws 1909, p. 372;
Montana, ch. 140, Laws 1911, p. 403;
Nebraska, 6635, Stats. 1911, sec. 158, *et seq.*;
New Hampshire, ch. 122, Laws 1913, p. 611;
New Jersey, ch. 134, subch. 90, p. 446, Laws 1902;
ch. 128, Laws 1893, p. 232;
New York, ch. 28, Consolidated Laws 1909, sec.
230, *et seq.*, p. 2663;
North Carolina, ch. 89, Public Laws 1913, p. 131;
North Dakota, ch. 191, Laws 1913, p. 280;
Ohio, Stats. 3631—11, sec. 1, *et seq.*; p. 2203,
Bates Ann. Ohio Stats.;
Oklahoma, sec. 3486, Stats., Revised Laws 1910;
Oregon, ch. 217, Laws 1911, p. 354;
Pennsylvania, Act April 6, 1893, Act No. 5, p. 7,
Laws 1893;
Rhode Island, Act 803, p. 346, Laws 1912;
South Carolina, Act 285, p. 554, Laws 1910;
South Dakota, sec. 725, Stats., Revised Code,
1903;
Tennessee, ch. 480, Acts 1905, p. 1021;
Texas, Stats. 4827, *et seq.*, Rev. Stats. 1911, p.
993;
Virginia, ch. 229, Laws 1914, p. 394;
Vermont, Stats. of 1906, 4825;
Washington, ch. 49, sec. 206, *et seq.*, p. 277, Laws
1911;
Wisconsin, sec. 1220, Stats. 1911; 51.32, Stats.
1913; sec. 1956, *et seq.*, Stats. 1913;
Wyoming, ch. 127, p. 177, Laws 1913.

Of the foregoing, twenty-nine states and Congress for the District of Columbia by statute expressly and distinctly define fraternal benefit societies as distinguished

from all other insurance companies or associations, such definitions uniformly embracing the following features:

Organization "without capital stock"; "carried on solely for the mutual benefit of its members and not for profit"; a lodge system; a representative form of government.

In these twenty-nine states the lodge system and representative form of government are defined substantially as in section 1956 of the Wisconsin statutes. These statutes exempt fraternal societies from the regulations, restrictions and taxation applying to insurance companies. See statutes above cited in Wisconsin, California, North Dakota, Connecticut, Virginia, Oregon, Texas, Arizona, Idaho, Louisiana, Michigan, Montana, Alabama, Washington, Wyoming, New York, Maryland, Ohio, South Carolina, Missouri, Nebraska, Indiana, Illinois, District of Columbia, Maine, Mississippi, Arkansas, North Carolina, Minnesota, Tennessee.

Of the forty-two states, eight others make substantially the same definition of fraternal societies and make the same exemptions in their behalf, though in slightly different form. See statutes above cited of Kansas, Iowa, Georgia, Oklahoma, Vermont, South Dakota, Pennsylvania, New Mexico. The remaining five of these forty-two states expressly exempt from the laws applying to insurance companies "fraternal benefit societies" without a restrictive definition of the term. See above cited statutes of New Hampshire, Colorado, Rhode Island, New Jersey and Florida.

At least seventeen states, in exempting fraternal societies from taxation expressly declare them to be "charitable and benevolent" institutions.

Thus:

"Every fraternal benefit society organized or

licensed under this act is hereby declared to be a charitable and benevolent institution and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment."

See above cited statutes of California, North Dakota, Connecticut, Virginia, Oregon, Texas, Arizona, Idaho, Louisiana, Michigan, Montana, Alabama, Washington, Wyoming, New York, Maryland, Indiana.

This well-nigh universal recognition of the distinction as between fraternal societies and old line life insurance companies for purposes of regulation and taxation is of very great significance upon this inquiry. In *German Alliance Insurance Co. v. Kansas*, *supra*, it was argued with great earnestness, in opposition to a law providing for state regulation of the premium rates of fire insurance companies, that the business of insurance is a private contract, and therefore not within the doctrine of *Munn v. Illinois*, 94 U. S. 113, and similar cases. Upon this ground, among others, it was there urged that the act of the Kansas legislature transcended the recognized limits upon governmental interference under the police power. In answering this contention, this Court pointed to the laws of the several states regulating insurance and insurance companies to show that there was a basis in fact for the separate classification of such companies and for legislative treatment of them differing from that applying to ordinary private business. What is said there on the opinion by Mr. Justice McKenna is equally applicable here (*italics ours*):

"Those regulations exhibit it to be the conception of the lawmaking bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general

cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis." (233 U. S. p. 412.)

Such "judgment from experience" is entitled to great weight.

Tanner v. Little, 240 U. S. 369, 386;

Central Lbr. Co. v. So. Dakota, 226 U. S. 157, 160;

Purity Extract & T. Co. v. Lynch, 226 U. S. 192, 204-205.

Whether fraternal benefit societies are of such public benefit that they ought to be encouraged by exemption from taxation is plainly a matter of opinion and of policy primarily, if not wholly, for the legislature to decide. These are hardly matters for proof. There may be and doubtless are those who believe or are of the opinion that fraternal societies are of no public benefit and that their fraternalism or other high professions are but sham and hypocrisy to serve a sordid purpose, and who would so testify. There are doubtless also those who would have like opinions and give like testimony about churches and other religious or charitable institutions commonly encouraged by exemption from taxation. But their testimony, it seems to us, would be inadmissible. At most it would be but opinion and prove no more than a difference of opinion. The state's choice between such differing opinions is *made authoritatively and conclusively* by the legislature, as was said here in *Erie Railroad Co. v. Williams*, 233 U. S. 685, at p. 699 (italics ours):

"The legislature is in the first instance the judge of what is necessary for the public welfare and a

judicial review of its judgment is limited. *The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.*”

Among other cases directly to this point are:

Jacobson v. Massachusetts, 197 U. S. 11, 30;

Laurel Hill Cemetery v. San Francisco, 216 U. S. 358;

Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 565;

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 414;

Atlantic Coast Line v. Georgia, 234 U. S. 280, 288;

Heath & Milligan Co. v. Worst, 207 U. S. 338, 356-357.

The public written and spoken opinion of well informed men in testimonial to the benevolence, fraternalism and patriotism of the fraternal benefit societies and their influence for good citizenship would make volumes. The following resolution adopted by the National Fraternal Congress in 1887, is published by Mr. Abb Landis in his book on “Life Insurance.”

“Resolved, That a Fraternal Society is an organization working under ritual, holding regular lodge or similar meetings, where the underlying principles are visitation of sick, relief of distress, burial of dead, protection of widows and orphans, education of the orphan, payment of the benefit for temporary or permanent physical disability or death, and where these principles are an obligated duty of all members to be discharged without compensation or pecuniary reward, where the general membership attends to the general business of the order, where a fraternal interest in the welfare of each other is a duty taught, recognized and practiced as the motive and bond of the organization.

"Resolved, That any association, however worthy in business point of view, not possessing the characteristics above mentioned, cannot be legitimately termed a 'Fraternal' Society or Order." (Landis, pp. 17-18.)

The annually published Proceedings of the National Fraternal Congress are replete with testimonials by men prominent in public and private life as to the practice and teaching of fraternalism, benevolence and good citizenship by the fraternal societies. We will quote but one. Insurance Commissioner Hartigen, of Minnesota, before the National Fraternal Congress in 1910 (italics ours):

"A fraternal beneficiary society has two distinct functions; the *first*, to *unite fraternally its members to the end that each may be furnished, according to his needs, aid, consolation, assistance, sympathy and friendship*. While the individual is aided in these ways, the community benefits from this cultivation of the altruistic spirit. These societies preach and practice the doctrine of the brotherhood of man and both individual and community are benefited. The second function is to provide substantial benefits for the dependents of the member upon his death." (Proceedings National Fraternal Congress 1910, p. 130.)

That such societies are truly fraternal and benevolent is certainly the common belief and, we think, with possible exceptions, a justifiable one. It is certainly not impeached when adopted by the legislature by opposing contrary opinion or by reference to judicial writings in some cases dealing with the property rights and obligations of some of the societies.

As against fraternalism and its teachings, as inculcated and practiced by the fraternal societies, the old

line company teaches only the individual financial advantage of a purely business contract of insurance. As against the appeal of brotherhood, benevolence and mutual social, moral and altruistic benefits to members and their families of fraternal societies, the old line insurance company relies upon the strength of its accumulated reserve, its history of earnings and dividends and an army of paid agents to "sell" insurance. The comparison amounts to contrast, a contrast between an institution on the one hand founded upon brotherhood and benevolence and an institution on the other hand resting solely upon the basis of business investment and risk—rates of interest and mortality tables.

Considerations of this and similar character have generally, in the past, been held reasonable considerations justifying legislative encouragement by exemptions from taxation in Wisconsin. Section 1038 of our statutes, in force substantially in its present form for a generation past, has exempted property from taxation upon the ground of its ownership and use by institutions and associations whose objects and purposes it has been thought good public policy to encourage. Churches, as institutions for the propagation of religious and moral teaching; educational institutions of a literary or scientific character; turner societies, as organizations for physical culture and gymnastic training are among the classes of institutions whose purposes have been recognized by the legislature as warranting tax exemption of property used by them and which exemptions have been approved by the state court.

St. John's Academy v. Edwards, 143 Wis. 551;

Lawrence University v. Outagamie Co., 150 Wis.
244;

G. B. & M. Canal Co. v. Outagamie Co., 76 Wis.
587.

Likewise railroads have been encouraged as a matter of public policy not only by exempting their property from taxation, but by laws which have imposed taxes upon the people in aid of their construction and which laws have been held valid.

West Wis. Ry. Co. v. Supervisors of Trempealeau Co., 35 Wis. 257;

W. C. R. Co. v. Taylor Co., 52 Wis. 37;

Olcott v. Supervisors, 16 Wall. 678.

It has never been held that, because religious or educational institutions or railroads held their property or made business contracts under the same rules of law that apply to other property owners, the exemption of their property from taxation was an unconstitutional discrimination under the general equality clauses of the state constitution or the Fourteenth Amendment. Certainly there is in the fraternalism of fraternal benefit societies and in their teachings and practices, affecting as they do, with some twenty million members in this country and Canada, the great body of the people, ample reason and ample grounds which might well appeal to the legislature for the encouragement of such organizations as a matter of public policy. The wisdom or expediency of that policy is not for the courts. Nor, we take it, is the court bound to inquire whether the legislature has been deceived or misled in the adoption of that policy. We think that the adoption of that policy in forty-two states of this Union and by Congress for the District of Columbia is conclusive against any such suggestion.

We submit, therefore, that in the fraternalism of these societies, bearing in mind all for which that fraternalism stands, even though there were no other grounds of distinction, there is an ample justification for a legis-

lative policy to promote and foster such institutions and that such legislative policy is a valid basis for the legislative classification here assailed.

Julien v. Model B. L. & I. Assn., 116 Wis. 79, 86-88;

Borgnis v. Falk Co., 147 Wis. 327, 353-355;

State ex rel. Kellogg v. Currens, 111 Wis. 431, 439-440;

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 95;

Brown-Forman Co. v. Kentucky, 217 U. S. 563, 573;

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 417-418;

Bradley v. Richmond, 227 U. S. 477, 484;

International Harv. Co. v. Missouri, 234 U. S. 199, 210-215;

Armour Packing Co. v. Lacy, 200 U. S. 226, 235-236.

Coming now to a consideration of the insurance feature of the fraternal societies, a comparison of that business with old line insurance business presents striking and important distinctions germane to license taxation and which constitute additional bases of classification for the exemption of fraternal societies from the license fee tax.

In the fraternal society the insurance feature, as well as the fraternal feature, is largely promoted and developed by the voluntary services of the members out of a spirit of loyalty to the organization and without pay or thought of pecuniary reward. Thus, new members are solicited by old members; the business of the local lodge is discharged and its affairs looked after by the

members in their meetings and by their elected officers who serve, generally, without pay. In the old line company, whether a stock company or a mutual company, practically no single service, however slight, is ever performed for the organization save for money paid either in the form of commissions or salaries. *The entire concern is a business proposition strictly and is so regarded by every one connected with it.* From the agent who "solicits business" and "sells insurance" to the president of the company who serves for a salary limited by law to \$25,000 a year, *the inducing motive for every act or service in the promotion or management of the business is financial gain and compensation.*

It is suggested in the plaintiff's brief that because it is a "mutual company" it is not organized or conducted for profit; that in this respect it does not differ from the fraternal society. The mutuality of the old line company, such as plaintiff, is, however, a thing quite different from that of the fraternal society. *It is a mutuality resting solely on a business basis.* Practically, it means simply that the policyholder is entitled to share in such profits and dividends as may remain, after the losses and expenses incurred by the management are paid. Its business is promoted, built up and managed by the men engaged therein as a business and for gain in the way of salaries and commissions. In this regard it presents a striking contrast with the fraternal society, whose membership is largely solicited by the members as a fraternal act and whose business affairs are, in a considerable degree, conducted by the members themselves as a fraternal service.

The enormous amounts expended by old line companies for "agents' commissions" and on account of "new business" speak eloquently of this distinction. The Wis-

consin legislative investigation of 1906, authorized by ch. 9, Laws 1905, Special Session, showed that plaintiff paid as commissions to individual agencies amounts ranging from \$88,000 to \$1,100,000 a year. This paragraph from the report is suggestive:

"While it appears that the Northwestern is able to secure a president at a salary of \$25,000 per annum, a general counsel at \$17,000 per annum, an actuary at \$12,000 per annum, and a superintendent of all its agencies at \$12,000 per annum, it is contended that it cannot employ competent general agents at a salary of \$20,000 per annum."

Wis. Joint Legis. Ins. Inv. Comm. Report, 1906, pp. 48-49.

The plaintiff's report to the insurance department of one year's business upon which license fees here sued for were assessed shows the following significant items of expense:

Commissions to Agents.....	\$4,733,585.90
Salaries and all other compensation of officers, directors, trustees and home office employees	862,172.18
Advertising	228,854.50

Wis. Life Ins. Report, 1913, p. 148.

Of the above commissions paid agents, \$2,117,610.77 was on first year premiums.

The Modern Woodmen of America is selected by counsel as a representative fraternal society comparable to the plaintiff company for purposes of comparisons made at page 123 of plaintiff's brief. That society was also selected by the legislative investigating committee for comparison with the plaintiff company in regard to the expenses of each on account of insurance business done. The following from the committee report shows the re-

sult, in *expense saving*, of the application of fraternalism in the management of the insurance business as conducted by fraternal societies as compared with the expenses of insurance management wholly on a business basis (parentheses and italics ours):

"In the Northwestern Mutual the actual net mortality paid (in the year 1905) amounted to \$4,989,073, while the total expense amounted to \$5,538,177, or 111 per cent of the net mortality. Of this expense \$5,156,504 was insurance expense, or 105 per cent of the net mortality. The total net mortality of the *thirty-five companies* doing business in Wisconsin was \$92,360,127, and the total expenses \$122,399,598, or 132 per cent of the net mortality.

"The Modern Woodmen of America, the largest fraternal society, disbursed for death claims the amount of \$6,616,044, and disbursed for expenses \$938,020, or 14 per cent of the death claims. The death claims of *sixty-seven fraternal societies* doing business in this state amounted to \$43,888,503, and the disbursements for expenses to \$6,685,432, or 15 per cent of the death claims."

Wis. Joint Legis. Ina. Invest. Comm. Report, 1906, p. 232.

Such comparison serves to prove that the fraternalism of the fraternal societies is real and that it is a fraternalism of benevolence and of service. It is a fraternalism that "counts for dollars" (Landis p. 253)—dollars saved through the personal services of members prompted by loyalty to the organization and by the spirit of brotherhood and altruism inculcated in the membership by the teaching of fraternalism.

Other fundamental distinctions exist between the two systems in regard to the character of insurance contracts which they make and the rules and principles by which they are governed in making them. In this respect plaintiff cites a number of cases from which it deduces,

in effect, the proposition that the contracts of insurance embraced in the beneficiary certificates of fraternal societies are construed and enforced in the courts by the same principles of construction and rules of law which apply to the construction and enforcement of ordinary policies of life insurance. These cases, however, do not alter the terms or the character of the contract of insurance represented by the membership certificate in the fraternal society, but on the other hand recognize and enforce the features of such contract, which are distinct and different from anything found in the ordinary policy of insurance. As it seems to us these cases therefore quite fail to sustain plaintiff's contention here.

An important distinction is found in the limitation which is imposed universally by the practice and rules and laws of the societies and very generally by statutes in the several states upon the class of persons who may be made beneficiaries in the certificates of membership or benefit certificates of fraternal societies. This is a limitation growing out of and in harmony with the fraternal and benevolent character of such societies, in that regard distinguishing the insurance furnished by old line companies in which policies are frequently taken and very generally assigned for pure commercial and business purposes. No less than *thirty-four states* have statutes which limit the class of persons who may be named as beneficiaries in membership or beneficiary certificates of fraternal societies, in the following or similar language:

"The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; * * * and

no beneficiary will have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes."

See statutes cited, *supra*, of the following states: California, North Dakota, Connecticut, Virginia, Oregon, Texas, Arizona, Idaho, Louisiana, Michigan, Montana, Alabama, Washington, Wyoming, New York, Ohio, South Carolina, Missouri, Nebraska, Indiana, Illinois, District of Columbia, Maine, North Carolina, Minnesota, Tennessee, Kansas, Iowa, Georgia, Oklahoma, Vermont, South Dakota, Pennsylvania.

Contrast the foregoing with the following statement with regard to the uses and purposes of policies of insurance issued by the plaintiff as set forth in the complaint (*italics ours*):

"That said several policy contracts between said plaintiff and the residents of said states have been and are *subject to sale, assignment and transfer, and to use as collateral security and other commercial purposes*, and that the same have been and are a *common subject of sale, pledge, assignment and transfer* as articles of commerce, and have been and are used extensively as collateral security and for other financial and commercial uses, and are valuable for each and all of said purposes and for other general purposes of trade and commerce, and *many of them are applied for and issued for the sole purpose of protecting and increasing the value of the rights and property of individuals and corporations engaged in financial and commercial transactions.*"
(Trans. pp. 17-18.)

A further distinction as between insurance as conducted by fraternal societies and by old line companies, and perhaps the most important with respect to the

character of the contract, is that indicated by the term "assessment company" as used in the statutes (sec. 1220; sec. 51.32; 1958, subsec. 2 (a); 1956, subsec. 10) and the term "level premium companies" or "old line companies" used with reference to companies of the class to which the plaintiff belongs. It is, in short, that the fraternal society makes with its member an open contract *reserving the right to levy any amount in the way of dues or assessments which may be found necessary* to pay the death losses and other claims upon the beneficiary fund of the society, while the level premium company contracts, *absolutely* for the *stipulated* annual premium that it will pay a stipulated amount of insurance upon the death of the insured.

Payment of the policy obligations of the level premium company and its ability to pay are secured by the maintenance of reserves invested in certain classes of investments, prescribed by law with a view to their security and convertibility. Such amount of reserve assets is thus absolutely required by law to be so maintained as will at all times equal the whole amount of accumulated liability on the old line companies' outstanding policy obligations. Such accrued liability is actuarially determined at the amount which, plus the present value of future net premiums received, will equal the amount to be paid on the policy at maturity either upon the death of the insured or prior thereto as may be agreed. In Wisconsin level premium or old line companies are thus required to "hold funds properly and safely secured to provide for its reserve liability over and above all its other liabilities," and the method of determining such liability is prescribed under section 1950, Wisconsin statutes. Similar statutes are in force generally in other states.

Such requirement is, of course, quite different from the provisions recently enacted providing for a valuation of the certificates in force in fraternal societies for the information merely of the members and of the public with regard to the condition of such society from an actuarial standpoint, but not requiring the maintenance of reserves and not measuring the solvency of such societies by actuarial standards. Section 1959, subsec. 22 and subsec. 22m, Wisconsin statutes 1913. With respect to the fraternal society the requirement of the statute now in force in Wisconsin in this regard is in substantial conformity, simply, with the universal practice, past and present, of all legitimate fraternal societies and the statutes generally in force elsewhere, and is embraced in the definition of the word "assessment" in section 1956, subsec. 10:

"The word 'assessment' as used in any law applicable to any fraternal benefit society, shall mean that the usual method employed by any organization within such provisions to meet its death losses is by assessments upon its surviving members, or that the amount estimated or required to meet such losses shall not be limited to a fixed sum."

This distinction also is one that is fundamental and one that rests upon the basic fraternalism of the fraternal society. It is a distinction between the purely business and financial enterprise of level premium life insurance, resting for its security upon accumulated assets, on the one hand, and a life insurance undertaking conducted by fraternal and benevolent institutions in which the chief security of the member for the payment by the society after his death of the death benefit called for by his certificate is the continued loyalty of the surviving members of the society and its fraternal and bene-

volent purposes. The distinction is that between the strength of the insurance company measured in accumulated dollars, on the one hand, and the "fraternity" of the fraternal society as "an element of strength which counts for dollars and can be relied upon" to enable the fraternal society to meet its death benefits as they become due on the other hand.

The manner of conducting the insurance feature of fraternal societies, in considerable degree, as a mutual service by the members and at the lowest practicable cost and through a representative form of government with a lodge organization, with insurance benefits limited to the members and their dependents, with the members pledged to pay such dues or assessments as the needs of the beneficiary fund may require and that pledge constituting, instead of the legal reserve required to be maintained by old line companies, the principle reliance of the members for the payment of insurance benefits as they become due, are all germane and substantial distinctions and considerations by which the insurance feature in such societies is characterized and which broadly distinguish that feature from the life insurance business as conducted by old line or level premium insurance companies.

Further distinctions might be mentioned. Regarding the tax as ultimately to be paid by the insured, the greater security and assured permanence of old line insurance compared with fraternal assessment insurance justify different treatment of them by way of taxation.

The policyholder in an old line company has in his insurance policy a positive asset not only in insurance protection but in accrued reserve value which he may draw out as a "cash surrender" or use as collateral upon which to borrow money. To this extent his policy

represents not merely insurance but *savings and investment* as well. In many forms of policies issued by old line companies such as endowment policies and the like, payable to the insured at the end of a specified period or to his beneficiary in case of his prior decease, a large part of the premium paid is for the investment feature.

None of these advantages attach to the usual certificate of membership in a fraternal society. Hence the policyholders in an old line company as the owners of its assets are better able to contribute something by reason thereof to the support of the government than are the members of a fraternal society.

Furthermore, the old line company has and *under the law must have assets—must be actuarially solvent*. The fraternal society frequently has no more than an emergency fund for the payment of current losses. Generally its assets are but a small fraction of its accumulated liabilities, determined as those of old line companies are determined. With possibly a single exception, none of these societies, organized or licensed in Wisconsin, is actually solvent on the whole life basis.

The rights of a policyholder in an old line company are absolute and permanent and are stipulated within the four corners of his contract. The benefit certificate of a fraternal society is, however, subject to the right reserved by the society to change its provisions in the manner provided in the laws of the society. Instead of insuring the member for a certain amount it *merely entitles him to share up to a specified amount in the beneficiary fund*. If the fund is impaired or cannot be raised by assessments his insurance is impaired or lost. The member's rights, moreover, are expressly conditioned upon his observing the laws and rules of the society and, speaking broadly, exist only subject to dis-

position by the majority as to them may seem for the general good.

We submit, therefore, that not only by virtue of the benevolent and fraternal objects and benefits resulting from fraternal societies as such, but also by reason of fundamental distinctions and inherent differences between the character of life insurance, so-called, as provided by such societies, and the character of life insurance, as furnished by level premium or old line companies, there are broad, substantial and germane bases of classification, ample, certainly within the wide field of discretion accorded to the legislature in that regard, to support the exemption of such fraternal societies from the license fee taxation imposed upon level premium insurance companies. There are other distinctions which might be pointed out, but we feel satisfied that the foregoing are sufficient, and clearly so, under the authorities which we have cited, among which the following are, we think, peculiarly significant:

American Sugar Refining Co. v. Louisiana, 179 U. S. 89;

Heath & Milligan Co. v. Worst, 207 U. S. 338;

Orient Ins. Co. v. Daggs, 172 U. S. 557;

German Alliance Ins. Co. v. Kan., 233 U. S. 389;

Citizens' Tel. Co. v. Fuller, 229 U. S. 322;

Cook v. Marshall County, 196 U. S. 261.

Conclusion

The plaintiff is a Wisconsin corporation. There its home office is located. There its business substantially is transacted. From the time of its creation by the state in 1857 to the time when the Orton Law took effect in 1900, it enjoyed absolute exemption from state taxation on its large personal property holdings. The state has constantly deferred to its interests in the adjustment of its laws relating to the taxation of foreign companies doing business in the state, so that the plaintiff might be relieved of taxes in other states. Exempted at home, protected abroad, the plaintiff has been fostered and favored by the state. It has grown and prospered until now it is one of the greatest life insurance institutions in the entire world.

In 1899, when the plaintiff's holdings had passed the hundred million mark and its annual income was in the tens of millions and it was still paying the state an almost nominal annual tax of \$300 plus 2% of its Wisconsin premium receipts, the Orton Law was passed. Then and ever after (see Trans. p. 36) the meeting place of the legislature has been the "wailing place" of the plaintiff. All, forsooth, because the state increased its license fee to an amount which, on plaintiff's exempted holdings, equaled, according to the insurance commissioner's official report in 1908, about one-eighth of the average tax rate paid on the general property of the state.

Legislature after legislature has heard and considered the plaintiff's case. While changes and concessions have been made, each succeeding legislature has adhered

to the view that the plaintiff, because of its domicile in the state, its large insurance business in the state, and its vast property holdings in the state, and the special benefits conferred upon it by the laws of the state, should contribute some substantial amount to the cost of government in the state. Failing to get the legislature to abandon this position, the plaintiff has repaired to the courts.

Its case has been heard in the highest court of the state, and reheard. That court, upon the fullest consideration, upon most elaborate briefs and extended arguments, and unanimously except on one point, and on that only one judge dissenting, decided against the plaintiff. That court not only overruled every contention of the plaintiff as to the constitutionality of the License Fee Statute, but in response to the arguments of plaintiff's counsel went further in its opinion, and speaking out of its knowledge of the laws and the taxing system of the state, held that the tax was not unjust to the plaintiff. Now plaintiff comes here to the Court of last resort and asks this Court to strike down the laws and court decisions of its home state. It invokes the Commerce Clause and the Fourteenth Amendment of the federal constitution.

As to the Commerce Clause, we submit that we have shown that the license fee is not a burden on interstate commerce in contravention of that provision of the federal Constitution. As to the Fourteenth Amendment, we submit that we have shown that the classifications and discriminations made by the License Fee Statute, either as between plaintiff and foreign companies or as between plaintiff and fraternal societies, are not arbitrary or unreasonable, but, on the contrary, are supported by substantial and germane distinctions well

within the principles of valid classification established and adhered to in the decisions of this Court. The soundness and legal logic of the opinion of the highest court of the state in this case should, we submit, commend the decision of that court to the approving judgment of this Court.

Respectfully submitted,

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Attorney General of Wisconsin,

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WALTER DREW,

Of Counsel.

NO. [REDACTED]

240 MAR 20 1918

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1916

**THE NORTHWESTERN MUTUAL LIFE IN-
SURANCE COMPANY,**

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

Reply Brief for Plaintiff in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1916

NO. 605

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Most of the contentions made on behalf of the state, and the authorities relied upon in support of them, are sufficiently considered in our original brief. As to some of them, we deem it proper to submit the following reply.

I

INTERSTATE COMMERCE

As to the argument that because the investment business is an indispensable incident of the life insurance business the N. Y. Life case is controlling authority.

It is argued that plaintiff's investment business should not be considered as a separate business, but as a necessary incident of its insurance business, and

that the fact that plaintiff asserts it to be an indispensable element of the insurance business demonstrates that the *New York Life* case is controlling authority. We might safely concede that the investment branch is not to be treated as a segregated and independent part of plaintiff's business. The fact is that the investment business is not a mere incident of the policy business, nor is the policy business a mere incident of the investment business. Both are essential parts of the whole.

But however we phrase the relation of the investment part to the whole, whether as an essential part, or branch, or incident of it, makes no difference as regards the application of the *New York Life* case. In either event, the fact remains that the opinion in that case does not discuss or determine the question whether the interstate intercourse involved in the conducting of the investment part of the life insurance business is interstate commerce. As we read the case, and as it has been interpreted in later decisions, this court founded its judgment upon the proposition (on which the previous cases were declared to be rested) "that contracts of insurance are not commerce at all, neither state nor interstate," and upon this ground distinguished the *Lottery* case and the *Textbook* case which were declared to concern "transactions which involved the transportation of property and were not mere personal contracts." (231 U. S. 510, 511.) The court quotes at length the language of Mr. Justice Field in the original case of *Paul v. Virginia* in which he declared that:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire,

entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not *articles of commerce* in any proper meaning of the word. They are not *subjects of trade and barter* offered in the market as something having an existence and value independent of the parties to them. They are not *commodities* to be shipped or forwarded from one State to another, and then put up for sale. They are like other *personal contracts* between parties which are completed by their signature and the transfer of the consideration." (p. 503; italics ours.)

From the later insurance cases referred to in the opinion, like expressions are quoted to the effect that "the business of *insurance* is not commerce" and that "the making of such a contract (*of insurance*) is a mere incident of commercial intercourse, * * * ." (p. 506; italics ours.)

The determination that *policies of insurance* are personal contracts, or mere incidents of commercial intercourse between the parties, and are not articles of commerce, nor the subjects of barter or sale, is far from holding (even though it be adhered to) that the interstate acquisition of negotiable *securities*, which *are* articles of commerce, and the subjects of sale, exchange and commercial use is not commerce.

That the court in the *New York Life* case did not consider the question here involved is further evidenced by the fact that the complaint contained no averments as regards the investment part of the business, unless may be called such the averment that policy loans were provided for in the policies, and that they were effected by transmitting an application therefor to the home office, which, if accepted, was followed by the execution of a loan agreement by the applicant and the transmission to him of the

amount of the loan. This policy loan feature of the business was not specifically referred to in the opinion.

That there was not presented to the court the investment side of the business is doubtless due to the fact that the statute under review was one which laid a tax upon *premiums* (less losses and ordinary expenses) collected *within the state*. No direct tax was laid on investment income.

We might add that it might be open to question whether the statute before the court in the *New York Life* case operated to impose any *direct* burden on interstate commerce, even though it were assumed that the policy business constituted commerce. The statute imposing a *restricted* tax upon net premiums received *within the state*, and the payment of the tax *not being made a condition upon the right to transact business*, there was perhaps room to hold that such a tax did not constitute a direct burden on commerce.

As to the argument that the interstate intercourse merely concerns loan transactions and involves transportation of mere evidences of debt and not of articles of commerce.

Counsel concede that the loan transactions are nearly all interstate "and that they constitute a necessary part of plaintiff's business." Also that they do not rely upon the grounds of distinction anticipated and met by us at pages 37-42 of former brief, namely, that the *mortgage* securities are acquired primarily for investment rather than resale, or are not ordinarily acquired in the open market but rather from the maker of them. Counsel apparently appreciate that the case, even as to the mortgage securi-

ties, should not go off upon such narrow ground of distinction. It would be unfortunate that it should do so. With the development of investment banks and companies, mortgages as well as bonds are the subject of absolute purchase in the market, and in increasing degree are and will continue to be thus acquired rather than from the maker.

The argument made by counsel is the broader one that the interstate intercourse merely relates to or concerns loan or financial transactions, and that the only interstate transportation involved is the communications concerning, and the written evidence of, the loans or the instruments which are given to facilitate the repayment of them. The distinction is attempted to be drawn between writings concerning the subject matter, which is designated as "the loan," and the transportation of things, like goods or instruction papers or lottery tickets, which are themselves the subject matter of sale.

Counsel apparently feel compelled to give the securities here involved some name, such as mere evidences of debt, which will afford semblance of plausibility to their attempt to exclude them as subjects of commerce. By so doing only are they able to distinguish such cases as the *Textbook* and *Lottery* cases. The length to which they go in the attempted distinction is evidenced by the following:

"If the instant case were one in which we had the question whether Congress might, under the commerce clause, regulate *the interstate transportation of assigned policies of insurance or of real estate mortgages or of bonds*, it might be argued that there is such analogy between such instruments and lottery tickets that Congress would have such power under the *Lottery* case. But such is not the question here. The question here is whether the

plaintiff's loan or investment business is commerce. To be in point even by analogy, the decision in the *Lottery* case would have to be that the conduct of or participation in a lottery is commerce, which, of course, is not there held." (*Italics ours.*)

This comes close to conceding the application of the *Textbook* and *Lottery* cases to the case at bar. The securities are admittedly the subject of the interstate intercourse and their interstate acquisition is admittedly an essential part of plaintiff's business. If they may be regarded as *legitimate subjects of commerce*, the attempted distinction made by counsel wholly fails.

To call them evidences of indebtedness or instruments representing indebtedness, or to speak of the intercourse concerning them as relating to financial transactions, does not help the solution. Were this all conceded, the fact would remain that there is present the interstate intercourse, which, *as is admitted, is a necessary part of the business*, and there is also present the fact that the *intercourse necessarily involves the interstate transportation of the securities*. If it could be said that securities are less the proper subjects of commercial intercourse than instruction documents, lottery tickets, crayon portraits, or the like, the argument of counsel might have plausibility, otherwise not.

As to argument that policy loans are not loans, but mere advance payments on the policy.

Attention is invited to Trans., folios 159-161, showing that these loans are made pursuant to the policy, on the sole security therefor, and up to the

amount of cash surrender value; also that the policy is assigned; also that policyholders are required to "pay annually to the company a sum which the amount withdrawn by them would have earned in interest if it had not been advanced to them at their request."

In substance a loan is made, pursuant to the policy, and on its security, and there is an absolute obligation for the payment of interest thereon, but the principal may be set off against the surrender value which the policyholder is entitled to demand at any time.

Such a transaction, (except that it is to be inferred that the *principal* as well as interest was required to be repaid), was held to create a credit in favor of the company, and subject to a law which taxed credits.

Metropolitan Life Ins. Co. v. New Orleans,
205 U. S. 395.

On the other hand, in *Orleans Parish v. New York Life Insurance Co.*, 216 U. S. 517, where the offset against the reserve value was apparently both as to *principal and interest*, and where there was no payment of interest required, it was held that the transaction created no credit in favor of the company which could be taxed as such.

Both these cases are referred to *Liverpool, etc., Ins. Co. v. Orleans Assessors*, 221 U. S. 346, where it was attempted to tax, as property, "the amount due plaintiff by its policyholders in this state for premiums on which credit of thirty and sixty days had been extended." It was held that an actual indebtedness was created which was taxable.

In the instant case, the interest collected by the company on policy loans amounting to over \$2,000,-

000.00 annually, was included in the base of the tax, as a part of "gross income." This was against the contention of the company that the interest should have been regarded rather as additional premium. The court construed the words "gross income" as used in the statute, to include this interest, and held that the interest payments did not come within the statutory exemption of non-resident "premiums collected". This conclusion was come to on the theory that, in the ordinary acceptation of the terms, the interest fell within "income" and not "premiums." (Tr. p. 29.)

As Justice Timlin pointed out in his dissenting opinion, if the policy loan transactions were to be regarded as loans and the interest as interest, then the policy loan transactions constituted interstate commerce; if the payment of the interest was to be regarded as the equivalent of collecting premiums, then it should have been excluded from the base of the tax.

It will be noted that the question here is not like that presented in the cases cited where the question was whether the loans would be *subject to a tax as credits*. The question here is whether the transactions involved in the making of them constituted interstate commerce. On this question it is not controlling whether or not a debt was created for the repayment of the advance. It is sufficient that, through interstate intercourse, the policies are conditionally transferred and transmitted to the company in consideration of the advances made upon them. An absolute sale is not essential to commerce. (Authorities p. 42 former brief.)

As to the cases cited by the state to the point that the investment transactions do not constitute interstate commerce.

Most of these cases are referred to at pages 46 and 47 of our former brief. As there pointed out, those of them which were decided by this court are well distinguished upon the ground noted in the *Blue Sky* cases (242 U. S. 539, 558), that they involved police regulations affecting interstate commerce only incidentally.

Upon this ground, *Nathan v. Louisiana*, 8 How. 73, was expressly distinguished in *Alabama, etc., Co. v. Doyle*, 210 Fed. 173, 183.

Of this case, which is the one chiefly relied upon, it may be further noted that it involved no tax on the earnings from the business.

These grounds of distinction apply also to the other decisions of this court which are cited by counsel. And it will be noted, moreover, that in them there was room to say that interstate transportation was not a necessary part, but rather a remote or fortuitous incident, of the business involved.

Counsel also cites certain decisions involving the contracts of building and loan associations.

Standard Home Co. v. Davis, 217 Fed. 904.

State v. Merrill, 144 Pac. 925. (Wash.)

Southern Bldg. & Loan Ass'n v. Norman, 32 S. W. 952. (Ky.)

The first of these cases was by a district judge, and went largely upon the authority of the *New York Life* case.

The Washington case was likewise decided on the authority of the insurance policy cases and of *Nathan v. Louisiana*. Aside from this, contracts

issued by a building and loan association can scarcely be compared, as subjects of transfer and commercial use, to negotiable securities.

The Kentucky case, as also the Alabama case, (*Nelms v. Mortgage Co.*, 92 Ala. 157) were decided without citation of authority, and the question here presented seems to have been only incidentally involved, if at all.

On the other hand, the supreme court of Wisconsin has held that the interstate acquisition by a resident of Wisconsin from a resident of another state of certificates of stock of a corporation, accompanied by the interstate transmission of the certificates, was a transaction in interstate commerce.

Callin & Powell Co. v. Schuppert, 130 Wis. 642, 650.

And note authorities p. 45 former brief.

II.

BURDEN ON INTERSTATE COMMERCE

As to the argument that the decisions of the state court conclusively determine that the statute imposes no burden on the investment part of the business.

It is argued that prior to the decision under review the state court had held the statute to impose a condition only upon the right to transact the *insurance*, as distinguished from the investment, part of the insurance business. In support of this are cited:

Travelers Ins. Co. v. Fricke, 94 Wis. 258.

Travelers Ins. Co. v. Fricke, 99 Wis. 367.

State ex rel. Fidelity & Casualty Co. v. Fricke, 102 Wis. 107, 115.

Charter Oak Life Ins. Co. v. Sawyer, 44 Wis. 387.

In the three *Fricke* cases, the question was merely whether the statute, as it then existed, which imposed a license fee upon every company doing a "life or accidental insurance business in this state" required the payment of a separate fee by a company transacting both a life and accident business. In view of the language of the statute, and its previous history, the state court concluded that a company so engaged was required to pay separate fees as though the two lines of business were done by separate companies. There is nothing in the cases having even remote relation to the question whether the life insurance business embraces not merely the policy, but the equally essential investment, part of the business.

It is worthy of note, moreover, that the state court held the payment of the license fee to be a condition upon the right to transact business. (99 Wis. 374, 375.)

As to *The Charter Oak Life Ins. Co. v. Sawyer*, above, it will be noted that the question arose on a demurrer to a complaint which alleged generally that the company was duly authorized to enter into the contract, and entitled to institute and maintain the action, and that there is nothing to indicate that the note and mortgage sued upon were acquired in the course of the transaction of the life insurance business within the state. For aught that appears it was an isolated transaction.

But it is said that the state court has, by its decision in this case, conclusively settled the proposition that plaintiff's investment business is not burdened by the license fee statute. This is claimed to follow from the fact that the court below held that the statute operates only on the "life insurance

business," leaving plaintiff to transact the investment part of the business, if it chooses, without license or tax.

The trouble with this contention of counsel is that, (though pretending to the contrary), it disregards the practical operation and effect of the statute, and the right and duty of this court to determine for itself whether the statute as applied results in a burden upon commerce.

Suppose it be conceded that in form the statute imposes conditions only upon the right of plaintiff to engage in the policy part of its business, and that this part of the business is not interstate commerce.

The fact remains that the policy business would not have been entered into, nor could it be maintained, without the necessary incident of free and unrestricted investment of premiums and funds. The investment part of the business can no more continue without the continued prosecution of the policy part of the business, than the latter could continue without the prosecution of the former. A condition upon the policy part of the business, therefore, operates, in practical effect, as a condition upon the investment part of the business, irrespective whether, in form or as construed below, the statute imposes the condition only upon the policy part of the business.

That a tax laid indiscriminately upon a business which is in part intrastate and in part interstate is repugnant to the commerce clause has been clearly indicated by this court. In *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 36-37, the court said:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered in a state, should, in addition, solicit orders for goods manufactured in and to

be brought from another state for delivery, could the former state make it a *condition* of the right to engage in *local business* within its limits that the corporation pay a given per cent of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition *would operate as a direct burden on interstate commerce*, and, therefore, would be unconstitutional and void. Consistently with the constitution no court could, by any form of decree, recognize or give effect to or enforce such condition." (Italics ours.)

In *Pullman Co. v. Kansas*, 216 U. S. 56, Mr. Justice White, in his concurring opinion, on pages 68 and 69, said:

"Moreover, to me it seems that where the right to do an interstate commerce business exists, without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on *with its interstate commerce business a local business*, would be a direct burden upon interstate commerce and in conflict with the principles stated in proposition 1. This follows, since *the imposition on a corporation which has the right to do interstate commerce business within the state of an unconstitutional burden for the privilege of doing local business is, in my opinion, the exact equivalent of placing a direct burden on its interstate commerce business*. It is not by me doubted that as a *practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business*." (Italics ours.)

On page 73 Mr. Justice White further said:

"It is true that in *Pullman Co. v. Adams*, 189 U. S. 420, and *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, the taxes which were assailed as invalid were treated as conditions imposed for

the conditions of carrying on local business, and which were therefore considered to be optional, *as the right to escape payment would result upon discontinuing the doing of the local business.* But the taxes in question in those cases were not levied upon interstate commerce, either directly or indirectly, *but only upon the business done within the state,* and therefore substantially involved no question of the absolute right of the state to impose an unconstitutional condition where the power of the state was not absolute but only relative. No reference was made in the opinion to the distinction stated in the previous cases between the absolute power to exclude, generally considered, and the relative character of that power *where the foreign corporation possessed the power to do an interstate commerce business, irrespective of the consent of the state.*" (Italics ours.)

In *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 86, the court said:

"In the cases at bar *the business for which the companies are chartered is not of itself commerce.* True it is that their products are sold and shipped in interstate commerce, and *to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the federal constitution against laws burdening commerce of that character.* Interstate commerce of all kinds is within the protection of the constitution of the United States, and *it is not within the authority of a state to tax it by burdensome laws.*" (Italics ours.)

In *Kansas City Ry. v. Kansas*, 240 U. S. 227, the court, referring to the *Baltic Mining Co.* case, said:

"It is true that in that case it was pointed out that *the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce;* but it was also distinctly stated that

the products of the corporations before the court were 'sold and shipped in interstate commerce,' and that to that extent they were 'engaged in the business of carrying on interstate commerce,' and were 'entitled to the protection of the federal constitution against laws burdening commerce of that character.' It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a direct burden upon interstate commerce that the tax was upheld." (Italics ours.)

But it is said to be a common thing for insurance companies to withdraw from a state and discontinue the issuance of insurance policies therein. This apparently involves the comforting thought that the plaintiff, by confining its policy business to states other than Wisconsin, may transact its investment business in and from Wisconsin unhampered by the conditions of the statute. This obviously is the only theory upon which can be founded the claim that the statute does not impose a condition, and hence a burden, upon the transaction of the investment, as well as the policy part of the business. To this argument there are numerous conclusive answers.

1. That the price for carrying on the investment business free from the conditions and burdens of the statute is the discontinuance by plaintiff of its policy business, or the removal of that part of the business to some other state, demonstrates the directness of the burden upon the investment business.

The penalty of discontinuing its policy business in Wisconsin, or removal from the state, is quite different in the case of plaintiff, from that which would attach in case of a foreign company removing from the state. Wisconsin is plaintiff's home, its home office is there.

The complaint alleges that:

"The plaintiff for many years last past has had and now has a large amount of permanent and valuable property at its home office and elsewhere in the State of Wisconsin upon which it has annually paid the taxes required by the laws of said state, the real estate tax so paid by it in the year 1911 having been the sum of \$19,001.38." (Tr. fol. 170.)

It has constructed and maintained a home office building, specially designed for and adapted to the conducting of both branches of its business. Its officers and home office employees reside in Wisconsin. To discontinue the policy part of the business in Wisconsin means stopping the further issuance of policies altogether (and the consequent retarding of the investment business) or it means the removal of its home office, and the establishment of a new home office in some other state. If it continued to conduct what remained of the investment business from Wisconsin, as it is argued it may do, the result is the maintaining of two home offices, in different states, and the consequent duplication of expense, inconvenience and waste.

This is quite a different thing from the withdrawal of a foreign corporation, instanced by counsel, which results in no change in home office location or organization and the mere closing of certain territory to the issuance of further policies.

In this connection should be noted the averment of the complaint:

"That to preclude the plaintiff, by onerous tax burdens or otherwise, from carrying on its business, including its policy business, in the State of Wisconsin, under whose laws it is

organized and where its principal and home office is located, would necessarily embarrass and jeopardize, if not prevent, the successful prosecution and carrying on of the business of plaintiff in other states and territories." (Tr. fol. 178.)

2. But it is not true, as counsel would have it, that by the removal of the policy part of the business to another state plaintiff would be free to transact the investment business without the payment of the license fee in question. The court below did not so hold. What the court said was:

"It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. If it does not do so, it may transact all the investment business which it desires to transact without paying any license fee under this law." (Tr. fol. 127.)

Were the plaintiff to remove the policy part of its business to another state, maintaining its investment business in Wisconsin, it would obviously be required to maintain officers and agents in Wisconsin, and to do so in its corporate capacity as a life insurance corporation. These officers and agents would be transacting a necessary part of the business of a life insurance company, and one so connected with the policy part of the business that of necessity their functions would have to do with the policy as well as the investment departments. There would thus be presented the case of a company "transacting the business of life insurance within the state" even though no policies were issued within or from Wisconsin. The situation is wholly different from that presented by the withdrawal of a foreign company, accomplished by the entire discontinuance of its

offices, withdrawal of its agents, and remittance of premiums direct to home office, such as was presented in a recent case in this court.

Providence Savings Ass'n v. Kentucky, 239 U. S. 103, 113.

Practically construed, the opinion of the court below must be taken to mean, not that the plaintiff could free itself from the payment of the tax by mere removal of the policy part of its business to another state, but that it could thus obtain exemption by adopting the happy expedient of giving up the policy part of its business altogether and continuing to exist only for the purpose of discharging its obligations. May a statute accompanied by such a result be said to impose no burden?

3. Counsel argue the proposition that the statute imposes a condition on the policy, rather than the investment part of the business, as though such fact, if true, were decisive of the point that no burden is imposed on the latter business. Herein, they overlook the fact that the burden may arise in two ways: (1) By requiring a license or payment of a fee as a condition, in substance and effect, of carrying on the interstate investment business; and (2) by laying the tax on the gross income derived from that business.

Though their argument were conceded to have relevancy to the first of these, it would nevertheless be wholly irrelevant as to the second. This is for the obvious reason that when a tax is laid upon *gross income from interstate business*, a direct burden follows from that fact alone, irrespective of whether the obtaining of a license or the payment of a fee is or is not made a condition of engaging in the business. This is exemplified in cases cited on page 69 of our

former brief, and has striking illustration in the recent case of,

St. Louis, etc., Ry. v. Arkansas, 235 U. S. 350.

In this case there was before the court a franchise tax of a fractional per cent tax upon proportion of capital stock represented by property owned and used in transacting business within the state. The court, per Mr. Justice Pitney, among other things, said (p. 363):

"The tax, as will be observed, is not in any wise based upon the receipts of the railroad company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, * * *."

Turning to what was apparently considered a separate and independent infirmity in the statute the court, on page 368, further said:

"Thus far we have dealt only with the authority of the state to levy a tax of this character, and with the mode in which the amount of the tax is ascertained. But the case presents another question that is more serious."

The court then considered Sec. 20 of the Act, which, in addition to other penalties, was claimed to make the failure to pay the tax cause for forfeiting the right of the corporation to transact business within the state, and said:

"If this must needs be construed to mean that for non payment of the franchise tax a foreign railroad corporation engaged in business as a common carrier of intra-state and interstate commerce is to forfeit its right to do business in

the state, not only with respect to intra-state but also with respect to interstate commerce, the effect would be to impose a condition upon its right to transact interstate commerce, and the act would be invalid as amounting in effect to a regulation of that commerce; unless, indeed, Section 20 could be treated as separable."

As to the cases cited by the state to the point that the tax does not impose a direct burden upon plaintiff's interstate investment business.

The later cases relied upon by the state have been sufficiently referred to at pages 75 and 76 of our former brief. Of the others, one was distinguished in *Pullman Co. v. Kansas*, 216 U. S. 71, (as numerous more recent cases have in effect operated to distinguish it) as involving no question of interstate commerce.

Horn Silver Mining Co. v. New York, 143 U. S. 305.

Another involved a property tax arrived at on the ratio of value of capital stock within to that without the state.

Adams Express Co. v. Ohio, 165 U. S. 194.

The others involved a tax on gross earnings within the state arrived at on a mileage basis.

Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379.

Cleveland, etc., Ry. Co. v. Bachus, 154 U. S. 438.

Maine v. Grand Trunk Co., 142 U. S. 217.

Delaware R. R. Tax Case, 18 Wall. 206, 231, 232.

More recent examples of the latter type of cases are:

U. S. Express Co. v. Minn., 223 U. S. 335.

Cornell Steamboat Co. v. Sohmer, 235 U. S. 549, 558.

These cases emphasize the vice of the statute in question. They exhibit the exercise of state authority to tax corporations engaged in interstate commerce, *when the tax is ascertained by reference to a measure within the authority of the taxing jurisdiction to apply*. Such an exercise of state authority is within the language of Mr. Chief Justice Fuller in *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 695-696:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But *property in a state* belonging to a corporation, *whether foreign or domestic*, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, *if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.*" (Italics ours.)

This language has been referred to and quoted in more recent decisions.

St. Louis Southwestern Ry. Co. v. Arkansas,
235 U. S. 350, 364.

Crew Levick Co. v. Penn., Adv. Ops. 1917, p.
122, 124.

Galveston Ry. Co. v. Texas, 210 U. S. 217, 227.

Western Union Tel. Co. v. Kansas, 216 U. S.
1, 26, 27.

The statute before the court is, we submit, a most flagrant example of violation of the principles above laid down. It lays the tax *directly upon gross income* from the interstate investment business. As elsewhere pointed out, it embraces not even the pretense of measuring the burden *with reference to property or income within the taxing jurisdiction*. On the contrary, relation to these forms of taxation, or to the duties of plaintiff as a taxpayer, *is absolutely excluded by the terms of the statute*, and, as applied to plaintiff, the statute results in an exaction not only "*susceptible of exceeding*" that which would ensue from other legitimate methods of taxation, *but one which is in fact several times greater*. (See especially pages 70-75; 105-117 former brief.)

III.

DISCRIMINATION BETWEEN PLAINTIFF AND FOREIGN LEVEL PREMIUM COMPANIES.

Counsel are in error in assuming that plaintiff waives the claim that the statute arbitrarily discriminates as between plaintiff and stipulated premium or assessment companies. (See note p. 2 former brief.) They are also in error in assuming that plaintiff waives its specification of error No. 3 (p. 15 former brief). This specification was not separately treated in the former brief because it was deemed that enough had been said to show that the tax was palpably arbitrary and violative of the fundamental con-

ceptions of justice embodied in the Fourteenth Amendment.

St. Louis Land Co. v. Kansas City, 241 U. S. 419, 421.

As to the argument that retaliatory laws justify the discrimination by Wisconsin.

Upon this feature of the case (discussed at pp. 94-100 of our former brief) counsel referring particularly to our argument at p. 98, asserts that it involves grounds of attack upon the statute which do not affect the plaintiff. The argument there made by us in no way infringes the limitation upon the right of attack to which counsel refer. As one factor showing that alleged lower taxation elsewhere could not justify the classification, we pointed out that domestic corporations of the *same class* to which plaintiff belonged, but which did not happen to transact business in other states or which should happen to withdraw therefrom, would receive no benefit from the retaliatory laws of such states. It is entirely open to a party who is a member of the class entitled to the protection of the equality clause, and who claims to be discriminated against, to urge that an alleged justifying difference in situation which would operate on some, but not others, of the same class, and which would make the law good or bad according to fortuitous circumstance, cannot be a germane or legitimate ground for difference in treatment.

Hatch v. Reardon, 204 U. S. 152, 160.

Plaintiff in no sense occupies the position of one not affected by the discrimination.

In the attempt to show that the retaliatory feature justifies the discrimination, counsel, somewhat irrele-

vantly, quote from a former Commissioner of Insurance to the effect that the "home company" had opposed legislative attempts to increase the tax upon foreign companies.

If we may be permitted like digression from the record, it is proper to say that this is but the statement of a half truth. The fact is that plaintiff has not taken the position that for its protection elsewhere foreign corporations should be substantially relieved from taxation in Wisconsin, but on the contrary, has consistently taken the position that there should be equality of treatment on a just and equitable basis to both domestic and foreign companies.

As to the argument that equivalency of burden would have resulted under personal property and income taxation.

The fact that the statute by its terms excludes relation to these other methods of taxation, and, therefore, makes them irrelevant, is pointed out in our former brief (pp. 89-92); as also is the fact that the constitutional application of either to the plaintiff would have resulted in a tax constituting but a fraction of that exacted by the statute in question (pp. 106-118).

As to the asserted equivalency of personal property taxation, the state is apparently unable to show that any burden approaching the exaction in question would result from personal property taxation, *save upon the assumption that the gross credits of plaintiff, without deduction for liabilities, are made the base of the tax.* This assumption, as before pointed out (pp. 106-112 former brief) is a wholly inadmissible one under the constitutional rule of uniformity prevailing

in Wisconsin. In addition to the cases cited at p. 110 of former brief, see:

Knowlton v. Supervisors of Rock County, 9 Wis. 378.

Hale v. City of Kenosha, 29 Wis. 599, 602, 604.

Beals v. State, 139 Wis., 544, 557.

In line with the declaration of the Wisconsin court in *C. & N. W. Ry. Co. v. State*, 128 Wis. 603, 604 (quoted at p. 110 former brief) is the language of the same court in an earlier case which serves as a pointed answer to the present contention of counsel:

"The answer to this argument is, that it creates different rules of taxation to the number of which there is no limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule upon the subject."

And again:

"For the very moment that the legislature says that a specified article or kind of property shall be taxed, or shall contribute at all towards

And see,

Johnson v. Wells Fargo, 239 U. S. 234.

And note that in *Kingsly v. Merrill*, 122 Wis., 185, cited by State, exemption of debts due from insolvent debtors was sustained rather than taxation of credits by different rules.

And that in practical administration of system of direct taxation of credits they were in fact taxed to only a very small fraction of their value, and that this led to the discarding of the system in 1911, and the substitution of the income tax, see

State ex rel. Heyl v. Henkel, 139 Wis., 41, 44.

Income Tax Cases, 148 Wis., 456, 504.

uniformity clause were wholly overlooked by the state court, in its decision below. The decision of that court that the reserve liabilities of life insurance companies were not "unconditional debts" under a statute (Sec. 1038) which never had, or was intended to have, application to life insurance companies, was quite irrelevant.

Irrelevant also is the quotation made by counsel from *Bells Gap R. R. Co. v. Penn.*, 134 U. S. 232, 237, to the effect that "it (a state) may allow deductions for indebtedness or not allow them." The language was used *arguendo*, and obviously without reference to the uniformity requirements of state constitutions, or the construction which might have been placed upon them by the highest court of the state.

Similar infirmity is found in the attempt of counsel to show equivalency of income taxation. The inference is suggested that our argument on this subject (pp. 113-117, former brief) is based in part upon tax rates lower than those established by the Wisconsin income tax law. These statutes are set out at great length, with the result that, so far from supporting the inference, they demonstrate the conservatism of our statement that the Wisconsin income tax rate has never exceeded 6% of taxable income. Indeed, they show that during the income years in question, (1911 and 1912) the rate which would have been applied to plaintiff (had it been subject to the income tax law) would not have exceeded 3% of *net* taxable income—for it is obvious that a life insurance company whose income is almost entirely derived from interest, does not equal, much less exceed, 6% of the value of its securities. (See subd. (f), sec. 1087m-6 (2), quoted in brief for state, p. 146.)

To build up anything approaching equivalency of net income taxation, counsel disregards all precedent, and all consideration of what constitutes the net income of a life insurance company. In the desperate attempt to excuse the unconscionable burden laid upon plaintiff, the Wisconsin income tax law, in obvious disregard of its terms, is converted into a law which taxes *capital* at a maximum *income* tax rate.

Counsel make the discussion of this branch of the case the occasion for quotation from a report of a former state commissioner of insurance (the same commissioner before referred to) in which the claim of plaintiff that the law in question subjects it to unconscionable taxation is jauntily met by computation which involves the aforementioned unwarranted assumption that insurance companies might constitutionally be subjected to a tax upon gross credits. The particular commissioner referred to is not the only one who has spoken on the subject. During the consideration of the subject by the State Tax Commission, one former commissioner said:

"The taxation of life insurance companies in Wisconsin is peculiar and without method or uniformity. Wisconsin companies are singled out, and more oppressive taxes are imposed upon them than any state in the union or any country in the world imposes upon its own or foreign life insurance companies."

Another former commissioner said:

"The only justification for imposing a tax upon the Northwestern Mutual Life is for and on account of the business done in the State of Wisconsin. The company pays license fees and taxes in other states, and its business done

in Wisconsin, with Wisconsin people, must therefore constitute the only justification for the tax collected from the company by the State of Wisconsin as a license fee. * * *

There is not a single reason to justify so exorbitant a tax imposition, except the power of the state to enforce its demands."

Records Tax Commission, File 3, p. 4.

A former governor said:

"Under the present law one domestic company (the plaintiff) paid as taxes in the year 1903 an amount equivalent to an ad valorem rate of 1.6% of the cash value of its policies in the state. At the same time some of the outside companies were paying less than one-tenth of 1% of the cash value or equity of the policies held in this state. This inequality should be remedied by legislative enactment." (Message of Governor R. M. La Follette to the legislature of 1905 p. 8; Wis. Pub. Doc., 1903-1904.)

The foregoing statements are by no means cited as controlling authority. But if unpleaded expressions of a former insurance commissioner may be injected, others would seem applicable. As regards the conclusions of the Wisconsin State Tax Commission set forth in the complaint, reached upon mature consideration, the brief on behalf of the state is significantly silent.

As to the application of the reserve power to alter or repeal corporate charters.

It will be noted that Section 1, Art. XI, Wisconsin Constitution, quoted by counsel at p. 130 of their brief, relates only to the alteration or repeal of the law, general or special, *under which a corporation is formed*. That the power to amend or repeal a corporate charter does not place a domestic corporation outside

the protection of the Federal Constitution should be self-evident. To the argument of counsel that it operates to grant immunity to license fee or tax laws which are otherwise in violation of the Fourteenth Amendment, it is submitted:

1. On an earlier page of their brief (pp. 104-105), counsel say:

"We shall not controvert the propositions made on plaintiff's brief that the tax is subject to the limitations of the Fourteenth Amendment nor that a domestic corporation may claim the protection of the Equality Clause against arbitrary or unwarranted discrimination by the state, both propositions conceded by the state court."

First impressions are frequently the correct ones.

Counsel might have added that the state court, in the decision below, has in effect construed the reserve power as not justifying the discrimination. That court expressly declared that the license fee in question was "subject to the general equality clauses of the state constitution and to the clause guaranteeing the 'equal protection of the laws' contained in the Fourteenth Amendment to the federal constitution," and further said:

"It is clear also that this means that there can be no arbitrary or whimsical classification, but that there may be classification founded upon real differences of situation and condition affording rational grounds for the difference in treatment." (Tr. fols. 115, 116.)

2. In the *Water Power Cases*, 148 Wis. 124, the Wisconsin supreme court, at p. 136, interpreted the constitutional provision in question as follows:

"We shall not attempt to define the extent or set the limits of the reserved right of repeal contained in the constitution of this state (sec. 1,

art. XI) or in a charter further than to say that such power does not authorize the confiscation or destruction of property or its taking without just compensation. It is to be construed like all constitutional provisions to harmonize with other commands and restrictions of the same instrument, and it must always yield to that paramount provision of the federal constitution which forbids the state to deprive any person of life, liberty, or property without due process of law and to the substantial equivalent of the latter in our state constitution." (Citing numerous cases, state and federal).

The inhibition against deprivation of property without due process of law to which the reserve power of the state is thus held to be subject, is a part of the same section of the Fourteenth Amendment which inhibits denial of equal protection. As the state court subordinates the reserve power to the former, likewise is it subordinated to the latter. This interpretation by the state supreme court of the provision in question is, of course, controlling here.

Moreover, it is in line with the declaration of this court:

"The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

Shields v. Ohio, 95 U. S. 319.

3. The reserve power, as its language plainly implies, is limited to the alteration or repeal of the law under which the corporation is *formed*. It does not authorize the imposition of burdens on the privilege of transacting a business, such as the life

insurance business, for which no corporate franchise is necessary.

Calumet Service Co. v. Chilton, 148 Wis. 334, 371.

Greenwood v. Union Freight R. R. Co. 105 U. S. 13.

The privilege of engaging in or conducting the life insurance business in Wisconsin is not essentially corporate, but may be exercised by individuals or unincorporated associations. Section 1946x, Wisconsin Statutes, being the first section of that part of Chapter 89 relating especially to life insurance companies and containing provisions for incorporating and regulating the same, contains the following:

"Unless the context of any statute or law relating to life insurance indicates otherwise, the following words and phrases shall be understood in the sense herein set forth and defined: * * *

(3) 'Company,' includes all corporations, associations, partnerships or individuals, engaged as principals in the business of life insurance, except fraternal or beneficiary corporations," etc.

Moreover, the statute here in question in terms is applicable to "every company, corporation or association," etc. (Former brief, Appendix, p. 1.)

A general law imposing a privilege tax in lieu of other taxes, cannot, of course, be regarded as an amendment of plaintiff's charter.

Such a law has no relation to matters of corporate administration which might have been embraced in the original charter. It operates to impair the implied terms of the grant that in the imposition of tax burdens constitutional limitations, state and federal, would be respected.

C. B. & Q. Ry. Co. v. Railroad Commission, 237 U. S. 220, 234.

4. The power to prescribe the conditions upon which a foreign corporation may enter a state does not sanction the imposition of a discriminatory franchise tax upon a foreign corporation which had theretofore entered the state and acquired permanent property therein.

Southern Railway Co. v. Greene, 216 U. S. 400, 416-418.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 49, 50.

No more may the reserve power sanction the imposition of a discriminatory burden upon a domestic corporation.

5. The point will not be considered here because not presented to the court below.

C. B. & Q. Ry. Co. v. Railroad Commission, 237 U. S. 220, 234.

IV.

DISCRIMINATION AS BETWEEN PLAINTIFF AND FRATERNAL ASSOCIATIONS.

On this branch of the case there is little to add. The tenderness of legislatures for fraternal associations, manifested by the statutes of numerous states referred to by counsel, is well known. But analogy of tax treatment by other states is not very helpful here. We judge from the brief of counsel that in many of the states the powers and operations of fraternal associations are confined within much narrower limits than prevail in Wisconsin. Thus they say that in not less than thirty-four of the states fraternal associations may

insure relatives or dependents only. The Wisconsin law, on the other hand, provides:

"Any member of such society, order or association may name as his beneficiary any person or persons designated by the laws of such society, order or association or if the laws thereof permit, his insurance may be made payable to his estate. Any member may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society, order or association which issued the same."

Sec. 1957. (5) Wis. Stats. 1913.

So, it is here averred and not questioned that in Wisconsin the statutes provide for the valuation of the policies of fraternal, for collection of prescribed minimum rates of assessment, the maintenance of a substantial reserve, the investment of their assets in such securities as are prescribed for other life insurance companies, and subject them to various other supervisory and regulatory requirements similar in nature to those imposed upon level premium companies. (Tr. fol. 184.)

The thing we complain about is that for the like privilege of transacting business within the state, Wisconsin exacts an enormous tax from one class of *mutual* companies (represented by plaintiff) and absolutely exempts another class of *mutual* companies with like prevailing and dominating characteristics. We submit that whether such outrageous difference of treatment is justifiable should not be determined upon considerations of the liberality of other states, perhaps under other conditions, to their fraternal. Nor should it be determined by looking to the remote and fugitive incidents of fraternalism. Rather should

it be determined in the light of the admitted facts pleaded. These facts demonstrate, as we submit, that judged by their pervading and dominating characteristics, there is presented no difference between the one class of mutuals and the other which is germane to or warrants the disparity of treatment here complained of.

Respectfully submitted,

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BYRON H. STEBBINS,
RAY M. STROUD.

Counsel for Plaintiff in Error.

It is not an arbitrary discrimination against domestic life insurance corporations, amounting to a denial of the equal protection of the laws, for a State to tax them by taking a percentage of their gross receipts, while exacting a fixed and comparatively slight fee from similar foreign corporations for the privilege of doing local business of the same kind. *Southern Ry. Co. v. Greene*, 216 U. S. 400, distinguished.

Neither is such arbitrary discrimination involved in imposing a license or privilege tax upon domestic old-line, level-premium companies, while exempting fraternal societies, having lodge organizations and insuring only the lives of their own members.

163 Wisconsin, 484, affirmed.

THE case is stated in the opinion.

Mr. Harry L. Buller, with whom *Mr. John M. Olin*, *Mr. Byron H. Stebbins* and *Mr. Ray M. Stroud* were on the briefs, for plaintiff in error.

Mr. Walter Drew, with whom *Mr. Spencer Haven*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought to recover certain taxes or license fees paid by the Northwestern Mutual Life Insurance Company to the State of Wisconsin; the same were paid under protest, and this action was to recover \$482,193.23 paid in 1912, and \$505,643.22 in 1913. The case was decided in the Supreme Court of Wisconsin, upon demurrer to the original and amended complaints, and judgment was rendered in favor of the State. 163 Wisconsin, 484.

The taxes in question were collected under the statutes of Wisconsin. (§ 1220, Wis. Stats. of 1911, being § 51.32 of the later Stats.; § 1221, now § 51.33, being the so-called retaliatory law; § 1222, subsec. 5 of § 1947, and § 1948.)

The substance of the statute immediately involved is thus stated by the plaintiff in error:

**NORTHWESTERN MUTUAL LIFE INSURANCE
COMPANY v. STATE OF WISCONSIN.**

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 340. Argued March 22, 1918.—Decided May 30, 1918

The "license fee," laid by Wisconsin on domestic "level-premium" life insurance companies doing business in the State, of 3% of the gross income from all sources during the year, except rents from real estate and premiums collected outside Wisconsin on policies of non-residents, as construed by the Supreme Court of the State, is a commutation tax in lieu of all other taxes on the personal property of the companies taxable in Wisconsin.

Assuming, but not deciding, that the foreign investment business of such a company, involving shipments of securities, correspondence, etc., beyond the State, amounts to interstate commerce, such a tax casts no burden upon such commerce, where the gross receipts are in effect used as a fair measure of the value of the property and franchise taxable, but not otherwise taxed, within the State.

A tax on life insurance business is not a tax on interstate commerce.

"Every company . . . transacting the business of life insurance within this state,' (excepting only such fraternal societies as have lodge organizations and insure only the lives of their own members) shall annually, on or before March 1, pay 'in lieu of all taxes for any purpose authorized by the laws of this state' (except taxes on real estate), certain prescribed license fees 'for transacting such business.'"

It appears that fraternal societies with lodge organizations insuring only the lives of their own members are not subject to this tax, and foreign level premium companies, similar to the plaintiff in error, are subject to an annual tax of but \$300.00 liable to increase under the so-called retaliatory law according as other States impose like taxes on similar companies of Wisconsin. Assessment and stipulated premium companies, domestic and foreign, are taxed \$300.00, or as to foreign companies such larger amounts as may be imposed under the retaliatory law. The license when granted authorizes the company to transact business until the first of March of the ensuing year unless sooner revoked or forfeited.

The contentions of a federal nature, raised by the plaintiff in error, are that this license tax imposes an unlawful burden upon interstate commerce in contravention of § 8, Article 1 of the Federal Constitution; that it violates the Fourteenth Amendment in denying the equal protection of the laws to the Northwestern Company by arbitrarily discriminating against it and in favor of foreign insurance companies, and between it and fraternal associations, both domestic and foreign; that it violates the Fourteenth Amendment in imposing an arbitrary, discriminatory, and confiscatory burden upon the Northwestern Company.

As to the annual license fee, it is made up as follows:

"Domestic companies. (1) If such company, corporation or association is organized under the laws of this

state, and is not purely an assessment or stipulated premium plan company under chapter 270, laws of 1899 (sec. 1955—1), three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March, excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured." [Wis. Stats. 1913, § 51.32.]

The statute also provides that such license fee shall be in lieu of all taxes for any purpose authorized by the laws of the State except taxes on real estate. The Northwestern Company was thus obliged to pay 3% of its gross income less income from rents of real estate, and less premium receipts from outside of the State.

Before entering upon a consideration of the errors assigned the nature and effect of this system of taxation must be borne in mind. The Northwestern Mutual Life Insurance Company is a corporation of the State of Wisconsin, having large reserves in that State, having a taxable situs therein. Of this statute the Supreme Court of Wisconsin said:

"It covers all the contributions which the state demands from the company or its business except real-estate taxes, which are relatively small in amount. It is common knowledge that all of the great level-premium insurance companies of the present day have vast reserve funds, to protect their liabilities on policies, running up into the hundreds of millions of dollars, and that these reserves are invested in interest-bearing securities, of

which real-estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real-estate mortgages amounting to \$153,562,654.39, of which only \$5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real-estate mortgages for the year ending on said last named date amounted to \$7,446,393.10 and its income from bonds to \$3,172,489.58. These securities are all credits, i. e., personal property of an intangible character, the situs of which for the purposes of taxation is in this state at the residence of the corporation."

And in the opinion on the filing of the amended complaint, added:

"In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the state with regard to the taxation of such property, its liabilities to policyholders, i. e., the present value of its outstanding policies valued as required by law, which is about ninety per cent. of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the three per cent. license fee requirement.

"We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as 'shall equal the amount of bona fide and unconditional debts by him owing.' This provision was repealed by the Income Tax Law, which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Ch. 658, Laws 1911.

"It seems entirely clear that the liability to policy-

holders which the plaintiff refers to is not in any sense an 'unconditional debt,' and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

"As to the contention that if the plaintiff were taxed under the income tax system its burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.

"At all events there does not affirmatively appear to be any such disparity as would condemn the law as arbitrarily discriminatory."

While these views of the nature and effect of the law are not conclusive upon us, they are accepted unless they appear to be ill-founded, and we find no reason to reject them. The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is in effect a commutation tax, levied by the State in place of all other taxation upon the personal property of the company in the State of Wisconsin.

It is insisted that because of the foreign investment business of the company, large in amount, and involving shipments of securities, correspondence, etc., beyond the State, this law burdens interstate commerce. We need not reiterate the reasoning upon which this court has repeatedly held that a State may not by its system of taxation impose burdens upon interstate commerce, the cases have been recently reviewed and the doctrine reaffirmed. *Looney v. Crane Co.*, 245 U. S. 178; *International Paper Co. v. Massachusetts*, 246 U. S. 135; *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147.

The construction of the act by the state court brings the case within the decisions of this court in *U. S. Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. In the former case a commutation tax upon gross receipts of the express company from state and interstate business was sustained as casting no burden upon interstate commerce. In the *Cudahy Packing Co. Case* a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the State, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value.

We have said thus much as to the alleged invalidity of this license tax as a burden upon interstate commerce, without deciding, as we do not find it necessary to decide, whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce. If it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State.

That the tax upon the life insurance business, which is the subject-matter of the license tax here involved, is not a tax upon interstate commerce is established by a reference to the recent full consideration of the subject by this court. *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495.

This brings us to the question whether the statute denies to the company the equal protection of the laws. That

the State is not because of the Fourteenth Amendment required to tax all property alike, and may classify the subjects selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classification may not be arbitrary and must rest upon real differences—subject to these qualifications the State has a wide discretion. In this connection the Northwestern Company contends that the tax upon it is so different from that imposed upon foreign level-premium companies doing a like business within the State that an arbitrary discrimination, amounting to a denial of equal protection, is exercised as against it and in favor of the foreign company. As we have already said, the foreign companies of like character pay a privilege or occupation tax in the sum of \$300.00 per annum. The state court held, and we think properly so, that foreign insurance companies occupy a relation to the State which is different from that of a domestic company. The latter has within the borders and taxing jurisdiction of the State a large amount of personal property, receiving protection, and subject to taxation. The foreign company has its reserves in the State of its domicile, and there subject to local taxation, which is of itself a substantial difference. Moreover, we have held that it is no denial of equal protection for a State to impose a different rate upon one of its own corporations than that imposed upon a foreign corporation, for the privilege of doing business within its borders. *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 118. In the case of *Cheney Brothers Co. v. Massachusetts*, *supra*, this court said:

“ . . . a State does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that ‘a State may impose a

different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them.' *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 118."

But, it is said that these decisions are opposed to the decision of this court in *Southern Ry. Co. v. Greene*, 216 U. S. 400. In that case the railway corporation of another State came into the State of Alabama in compliance with its laws, paid the license and property tax imposed upon other corporations doing business within the State, under sanction of the laws of the State acquired a large amount of railroad property therein, when it was attempted to subject it to a further tax for the privilege of doing business as a foreign corporation, which tax was not imposed upon domestic corporations doing the same kind of business in the same manner, and it was held that such classification was arbitrary and void under the Fourteenth Amendment. In that case we laid stress upon the fact that the tax related to railroad property not susceptible of other uses, which placed in the State had to remain there permanently, and could not be withdrawn at the pleasure of its owners. Under such circumstances, and dealing with that character of property, we held that the particular tax constituted such discrimination as to deny to the company the equal protection of the laws. That case was distinguished in the decision in *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, *supra*, and also in disposing of the case of the White Company involved in *Cheney Brothers Co. v. Massachusetts*, *supra*. The difference between the *Southern Ry. Co. Case* and the one under consideration is quite obvious.

As to the alleged discrimination between old-line level-premium companies and beneficial associations, which are exempted from taxation under this statute, we think the differences are plain. The fraternal and beneficial

features are wanting in organizations like that of the Northwestern Company. The ascertainment and collection of premiums and payments for insurance are upon wholly different plans. As to the alleged discrimination in favor of stipulated premium companies and assessment companies, the plaintiff in error in its brief says that no domestic company of these classes and but one foreign company existed in Wisconsin in 1912, and that as to this its argument as to discrimination in favor of foreign level-premium companies applies. What we have already said disposes of that contention. We find no reason to disagree with the Supreme Court of Wisconsin in the conclusion that differences upon which classification rests in this statute are not fanciful, but real and substantial, and that the dissimilarities in treatment fall short of that arbitrary classification which amounts to a denial of the equal protection of the laws.

We find no error in the judgment of the Supreme Court of Wisconsin.

Affirmed.

MR. JUSTICE CLARKE took no part in⁷ the consideration or decision of this case.

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